Supreme Court, U.S.
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In the Supreme Court of the United States

No. 341

OCTOBER TERM, 1970.

LAKEWOOD MANUFACTURING COMPANY,
Petitioner,
vs.
AMERICAN EQUITABLE ASSURANCE COMPANY OF NEW YORK, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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LAKEWOOD MANUFACTURING COMPANY,

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vs.

AMERICAN EQUITABLE ASSURANCE COMPANY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on February 6, 1970.

CITATIONS TO OPINIONS BELOW.

The memorandum opinions of the District Court are unreported and are printed in the Appendix hereto, *infra* pp. 25, 27, 68. The opinion of the Circuit Court of Appeals is unreported and is printed in the Appendix hereto, *infra* p. 18.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on February 6, 1970. Rehearing was denied on April 3, 1970. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

I. Whether it is proper or permissible to apply *arbitration* standards in deciding the validity or invalidity of an award rendered under a standard fire insurance *appraisal* clause.

II. Whether a fire loss appraisal proceeding may alter the coverage, risk, conditions or definitions of a contract of insurance.

III. Whether a Circuit Court of Appeals may reverse a District Court on the basis of interpretation of the factual issues of a case.

STATEMENT OF THE CASE.

On April 10, 1963, petitioner, Lakewood Manufacturing Company, filed separate suits on its twelve business interruption insurance policies in the Common Pleas Court of Cuyahoga County, Ohio. Petitioner sought to recover payment for the business interruption losses it suffered as the result of a fire on October 3, 1961.

Respondents removed eleven of the twelve suits to the United States District Court for the Northern District of Ohio, where the cases were consolidated for the purposes of trial. The twelfth case, *Lakewood Manufacturing Company vs. Buckeye Union Insurance Company,* remains pending in the Common Pleas Court, as both parties are residents of Ohio.

Petitioner had business interruption insurance providing for indemnification of loss of earnings from fire damage. The guidelines for determination of the business interruption loss were set forth in the policy contract which was drafted, priced and sold by respondents. The policy stated that petitioner was to be indemnified for ACTUAL LOSS SUSTAINED from the fire for that period of

time required "to rebuild, repair or replace" the destroyed or damaged real or personal property.

Additional coverages included payment for any expenses incurred by petitioner to reduce the loss, and "payroll expense, to the extent necessary to resume operations of the Insured with the same quality of service which existed immediately preceding the loss."

ACTUAL LOSS SUSTAINED, the elements of which have been outlined in the policy contract, has been judicially defined as the "net profits on the business thereby prevented, fixed charges and continuing expenses, and expenses for reducing the loss." *Studley Box & Lumber Co. vs. National Fire Ins. Co.*, 85 N.H. 96, 154 Atl. 337 (1931).

The standard fire policy, to which the business interruption endorsement was attached, contained an appraisal clause, a standard clause in *every* fire insurance policy issued throughout the United States.

The appraisal clause is as follows:

"In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser; and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party select-

ing him and the expenses of appraisal and umpire shall be paid by the parties equally."

When the petitioner and respondents failed to agree on the amount of the business interruption loss, respondents invoked the appraisal clause. The appraisal award, signed by the respondents' appraiser and umpire on September 25, 1964, concluded that a reasonable period of time to restore the damaged business property of petitioner extended from October 3, 1961 to May 2, 1962, a period of seven months.

The appraisal award also concluded that a strike at Brunswick Corp., a major customer of petitioner, which was in effect from January 9, 1962 to April 6, 1962, would have to be considered in determining the actual loss sustained during the period of rebuilding (Oct. 3, 1961 to May 2, 1962).

It was further determined that but for the fire and the strike, the sales value of production for the seven month period of interruption would have been $2,894,305; to which a 10% profit was attached.

By the use of various mathematical formulas and ultimate conclusions, the award was reduced to cover a period running from October 3, 1961 to January 9, 1962, the beginning date of the Brunswick strike, even though the damaged plant and equipment were not restored until May 2, 1962.

Such non-reconcilable conclusions contained in the appraisal award, forced a review in the District Court which set aside the award on July 25, 1967. This decision was immediately appealed by respondents to the United States Court of Appeals for the Sixth Circuit which rejected a review at that time (p. 67 *infra*). The District Court, therefore, proceeded to determine the ACTUAL LOSS SUSTAINED which it determined to be $277,787 after a lengthy trial.

Following this decision respondents appealed to the Sixth Circuit Court of Appeals which rendered its opinion that the District Judge erred in setting aside the appraisal award. In arriving at this conclusion the Court of Appeals relied on the law of arbitration rather than the law of appraisal.

REASONS FOR GRANTING THE WRIT.

I. THE COURT OF APPEALS APPLIED ARBITRATION LAW TO AN APPRAISAL CASE IN CONFLICT WITH OHIO LAW.

The decision of the Sixth Circuit Court of Appeals has developed utter chaos as to the proper standard to apply in determining the validity or invalidity of an insurance appraisal award. The decision of the Court of Appeals is in conflict with the present applicable law of the State of Ohio, and with decisions rendered in several federal circuits. It is imperative that a clarification be made for the benefit of the multitude of insurance companies and millions of Americans who rely upon such standard fire insurance policies, and endorsements thereto, for their well-being and security.

The law of appraisal in Ohio, being the general rule, is that:

> "* * * every reasonable intendment and presumption is in favor of an award of appraisers selected to determine the value of insured property destroyed by fire, and the award will not be vacated unless it clearly appears that it was made without authority or was the result of fraud or *mistake or misfeasance* of the appraisers." 30 OHIO JUR. 2d, *Insurance* § 734 (emphasis added).

This statement of law is also considered to be the general rule. *In Re Waters*, 93 F.2d 196 (5th Cir. 1937); 44 AM. JUR. 2d, *Insurance* § 1719.

It is to be greatly stressed that there is a special distinction between appraisal and arbitration set forth in most states. In *Royal Ins. Co. v. Ries*, 80 Ohio St. 272, 88 N.E. 638 (1909) it was held that a fire appraisal clause such as the one cited in this case "* * * is a provision for an appraisement and not for an arbitration, and such submission is not to be judged by the strict rules applicable to arbitration and award * * *" (Syllabus, *Royal Ins. Co. v. Ries, supra*).

This rule was applied in *Rademaker d.b.a., etc. v. Atlas Assurance Co., Ltd., et al.*, 98 Ohio App. 15, 120 N.E. 2d 592 (1954) which reversed a judgment permitting fire insurers to invoke an arbitration statute to confirm a fire loss appraisal award. The court drew the division sharply:

> "It is to be noted that this section (2711.01, Revised Code) provides for the arbitration of controversies arising out of a written agreement. There is no provision in this section dealing with an agreement to appraise a claimed loss." (98 Ohio App. at p. 20).

In addition to arbitration and appraisal being different creatures, there is also a difference in their procedural structure and the legal standards in determining the validity or invalidity of awards emanating from these different systems.

As is true in most other jurisdictions, an appraisal award may be set aside in Ohio for "fraud, mistake or misfeasance" while an arbitration award may be set aside in Ohio only for fraud, manifest mistake or for statutory grounds (Section 2711.10, Ohio Revised Code).

The distinction is clear. Because of the elaborate safeguards and procedures enunciated by the arbitration statutes, the courts place greater reliance on results from arbitration machinery and offer the award far greater protection than the informal, non-binding appraisal device.

Additionally, arbitration by its very nature and general language of submission is presumed to be final and conclusive and absolutely binding upon the parties. The insurance appraisal has never been considered binding because the policy language prepared by the insurer deliberately has left the question open.

Rademaker d.b.a., etc. v. Atlas Assurance Co., Ltd., et al., supra, expresses the difference:

> "Unless, therefore, the insurance contracts, which are not in evidence, contained provisions binding the parties to abide the amount determined by the appraisers, there could be no legal obligation on the part of the appellant to be absolutely bound thereby." (98 Ohio App., at p. 19.)

Unfortunately, the Sixth Circuit Court of Appeals applied the higher arbitration standard of "fraud or manifest mistake" rather than the proper appraisal standard of "mistake," being any error which causes the award to be unjust as a whole or alters the rights of the parties, or "misfeasance," being the improper execution of a proper act.

It is evident that the Court of Appeals relied solely and exclusively on arbitration standards since every case cited by the court in the body of its opinion of February 6, 1970, deals with cases involving arbitration and arbitration awards.

If there is to be diversity of standards applied to appraisal awards in the various circuits and states, great confusion will result and a foundation for vexatious litigation will be laid.

This is particularly true regarding highly mobile property such as automobiles and mobile housing units which may be covered by standard fire policies issued in one jurisdiction and then be moved to another jurisdiction with different appraisal procedure standards.

II. THE EXPRESS LANGUAGE OF COVERAGE OF FIRE INSURANCE CONTRACTS HAS BEEN ALTERED BY THE APPRAISAL PROCEEDINGS UPHELD IN THE COURT OF APPEALS.

The decision of the Sixth Circuit Court of Appeals in effect has caused a reformation of all standard fire insurance policies, and all business interruption insurance endorsements. The magnitude involved is staggering, running into the billions of dollars.

If the Court of Appeals' interpretation of the appraisal award is permitted to stand, the standards for appraisal will be altered, the contractual coverage afforded under business interruption insurance will be drastically modified and reduced, and various provisions of the policy will be changed from their original meaning and purpose.

The public which has purchased these specific policies with specific conditions has a right of clarification as to the coverage afforded in view of the decision of the Court of Appeals.

Specific clarifications required include:

(a) The standards to which appraisers shall be held in their proceedings under standard fire appraisal clauses.

(b) Definition of the policy term "ACTUAL LOSS SUSTAINED," including whether an appraisal award containing mistake and awarding less than ACTUAL LOSS SUSTAINED takes precedence over the indemnification clause of the insurance contract purchased to protect the insured for the actual loss sustained.

(c) Definition of the period of interruption under a business interruption insurance policy. The Court of Appeals decision leaves only confusion in this area since the appraisal award indicated that the insured's facilities were

not rebuilt, replaced or restored,[1] until May 2, 1962, but in spite of that failed to determine the actual loss sustained by the insured after January 9, 1962.

It is impossible to reach such a conclusion when the means of production are still impaired. It is impossible, as existed here, to allow expenses to reduce loss for one period of interruption (October 3, 1961 to May 2, 1962) and yet in the same award state no loss existed beyond January 9, 1962. How is it possible to have incurred expenses to reduce loss, yet for the very same period of time to have had no losses?

It is particularly important that the period of interruption standards be established judicially since the entire determination of any business interruption loss is contained within this period of time.

A major portion of the business interruption coverage was ignored by the superficial approach of the Court of Appeals.

Petitioner purchased this particular policy at extra cost, for it contained a special payroll clause, the general content of which is set forth earlier (p. 3 *supra*).

In essence, the coverage pays the salary for those key officers and supervisory personnel for that period when the premises and equipment are being rebuilt, replaced or repaired. The appraisal award states that this rebuilding period existed from October to May but then failed to pay one cent toward the salaries of the key personnel under the payroll coverage clause beyond January 9. Petitioner kept its key work force intact so it could maintain

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[1] Policy definition of the interruption period is the period of time required "to rebuild, repair or replace" the destroyed or damaged property.

the same quality of service after the rebuilding period. To be paid for this expense was not a matter of privilege, it was an absolute matter of right under the contract. This is not only a mistake but misfeasance of the very highest order.

(d) Does an appraisal award which reduces the coverage give, in effect, an unjust enrichment to insurance companies? If the risk is reduced, the premium should be reduced.

The specific items listed above must be properly determined. Failure to do so will create great danger since grave pronouncements of inequality from a throne of justice tend, over a period of time, to solidify into a rock of right, no matter how wrong.

This is particularly true in the construction of insurance contracts. As stated in Vol. 1 COUCH ON INSURANCE 2d, § 15:37, p. 709, et seq., it is the duty of the courts in interpreting insurance contracts to enforce and carry out the contract which the parties have made.

In order not to lead to unreasonable results, or to defeat the intention of the parties to a contract of insurance, the construction thereof must not be strained, arbitrary, irrational, unnatural or forced or strictly technical, rather, it must be fair, natural, reasonable, logical and practical, having reference to the risk and subject matter and the purposes of the entire contract. *Aetna Fire Ins. Co. v. Boon*, 95 U.S. 117 (1877).

The Court of Appeals in its zeal trying to find a way to confirm the appraisal award ignored the basic rule that the language of an insurance contract, including conflicts and ambiguities, is most strongly construed against the preparer.

Failure to follow the straightforward, uncomplicated path in the appraisal procedure resulted in non-reasoning

and complication, caused by adding ambiguity and confusion where none existed originally.

One example of the mutations spawned is that while the petitioner *actually* produced $1,843,000 during the period of interruption, the appraisal award only allowed a *potential* production of $1,595,057.

Even more graphic is the quandary developed by the inconsistent application of the 10% profit margin to varying levels of production. The award sets up a 10% level for a production of $2,894,000 over a seven month period, being an average of $413,000 monthly. When the award uses the pro-rata formula to cut-off the period to January 9, 1962, the production figure is reduced to $1,595,000 for a 3.3 month period (Oct. 3, to Jan. 9) developing an average monthly production of $483,000 or nearly 20% more than the seven month average. Despite this wide variation in monthly production which obviously widely varies the profit margin, the award used the same arbitrary 10% profit figure.

This is so preposterous that it is not even the intention of the umpire who stated in trial testimony that different profit margins should be applied to different levels of production.

Such areas of conflict were created by the failure to follow the policy provisions. The result is a tortured configuration of impossible conclusions and a mathematical cul-de-sac, lumped under the generous title of an appraisal award which for the sake of all to follow must not be allowed to stand in its present mis-shape.

III. THE COURT OF APPEALS, IN CONFLICT WITH OTHER COURTS OF APPEALS AND OTHER FEDERAL AUTHORITY, HAS SUBSTITUTED ITS JUDGMENT ON THE FACTS FOR THAT OF THE DISTRICT COURT.

A major cornerstone in the Court of Appeals decision is its conclusion that ambiguity in an appraisal award may be resolved in light of the testimony of the umpire and appraiser. The Court of Appeals then selected a few isolated portions of the testimony to decide that:

> "It seems clear to us that the appraisal team found that the period of business interruption ended on January 9, 1962, and that Lakewood sustained thereafter no actual loss due to the fire." (See: Opinion of the Court of Appeals, p. 22, *infra*).

The Court of Appeals thus invaded the province of the trial court and substituted its interpretation of the evidence for that of the trial judge, who heard all the testimony, observed all the witnesses, and patiently and meticulously prepared his decisions. The District Court found that the ambiguous appraisal award determined the period of business interruption to extend until May 2, 1962, and further concluded that:

> "*Other facts of record* in this case militate against the conclusion that the umpire intended to terminate the actual period of interruption on January 9, 1962.
>
> * * * * *
>
> "*In his testimony* the umpire stated that he recognized that the fire damage was not fully restored until May 2, 1962 (Tr. pp. 201, 202) and that he was aware that the rebuilding effort would interfere with production (Tr. pp. 233-235)." (District Court's Memorandum of July 25, 1967, p. 76 *infra*, emphasis added).

The Court of Appeals thus failed to recognize that the District Court *did* correctly apply the law according to

Aetna Casualty & Surety Co. v. American Surety Co., 64 F.2d 577 (4th Cir. 1933),[1] and *did* construe the ambiguous appraisal award in light of the umpire's testimony and the other evidence in the record.[2]

The opposite judgments of the Court of Appeals and the District Court are based on interpretation of the evidence. The review process is ordinarily limited to a determination of whether there has been an error of law. *McCaughn v. Real Estate Land Title and Trust Co., et al.*, 297 U.S. 606 (1936). Questions of weight of the evidence and credibility of testimony are for the trial court to decide. *Kingston v. McGrath*, 232 F.2d 495 (9th Cir. 1956).

Fact-finding functions have always been left to the trial court and his findings may not be set aside unless clearly erroneous. *Kansas City Stockyard Co. of Maine v. Anderson*, 199 F.2d 91 (8th Cir. 1952). The appellate court must take the view of the evidence most favorable to the appellee, and should not reweigh the evidence. *United States v. Ingalls*, 114 F.2d 839 (D.C. Cir. 1940); *Dowell, Inc. v. Jowers*, 182 F.2d 576 (5th Cir. 1950); Fed. R. Civ. P. 52(a).

The Court of Appeals consideration of *Aetna Casualty & Surety Co. v. American Surety Co.*, 64 F.2d 577 (4th Cir. 1933)[2] as license for an appellate court to reweigh fact issues therefore is in direct, irreconcilable conflict with all of the federal authorities cited above.

The Court of Appeals used less than 15 lines of testimony out by nearly 678 pages of trial transcript to justify its factual conclusion that the petitioner's facilities were rehabilitated by the end of December.

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[1] In its Opinion, p. 22 *infra*, the Court of Appeals charged the District Court with ignoring the rule of the *Aetna Casualty* case.

[2] See: Court of Appeals Opinion, p. 22 *infra*.

The District Court observed witnesses and heard testimony regarding the subject of destruction and replacement over several weeks. Hundreds of pages devoted to this situation in the transcript indicate that facilities were not back to normal until April. The trial judge gathered all the facts and concluded that the disability existed and affected production for six months, not three months as the Court of Appeals has decided without factual or legal justification.

The decision should be reviewed so appellate courts will have guidelines as to the scope and extent of reviewing a lower court decision setting aside an award.

CONCLUSION.

The questions involved in this case are of important significance to millions of individuals in the United States having standard fire insurance policies covering their homes, business and personal property. Although this case involves business interruption coverage, the standard-form appraisal proceedings are directly applicable to all types of fire losses.

Questions of applicable law, standards of appraisal award validity, and the scope of appellate re-evaluation of the facts apply to all fire policies. This is true not only where a loss occurs, but also in guiding individuals as to what fire protection they have purchased or are about to purchase.

Similarly, when business interruption coverage is involved, questions of the definition of the period of interruption and competent computation of the actual loss sustained become extremely significant.

Respectfully submitted,

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APPENDIX

APPENDIX.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

No. C-63-313.

(Entered May 12, 1970.)

Defendant, having appealed to the United States Court of Appeals for the Sixth Circuit from the judgment entered in this cause on the 18th day of November, 1968, and said court having issued its mandate dated the 14th day of April, 1970, wherein it was ordered, adjudged and decreed that such judgment be reversed, that the cause be remanded to this Court for proceedings consistent with the opinion of the said Court of Appeals, and that defendant herein and the defendants in Cases Nos. C-63-314 through C-63-323, both inclusive, recover jointly of plaintiff the costs on appeal in the total amount of One Thousand Four Hundred Eighty-six and 65/100 Dollars ($1,486.65);

Now upon the mandate of the United States Court of Appeals for the Sixth Circuit, dated the 14th day of April, 1970,

It is ORDERED, ADJUDGED AND DECREED that the judgment of this Court entered November 28, 1968, be and the same is hereby vacated and set aside; that this cause be restored to the docket for further proceedings in accordance with such mandate and that judgment be entered that plaintiff recover of the defendant the sum of Seven Thousand Five Hundred Forty-two and 42/100 Dollars ($7,542.42); that a further judgment be entered that the defendant herein recover of plaintiff the sum of Sixty-five and 04/100 Dollars ($65.04) for costs on appeal; that the costs of the proceedings in this Court be determined and

assessed against plaintiff herein; that the Clerk of this Court is hereby directed, upon receipt of an affidavit sworn to by plaintiff that no further proceedings or appeals in this cause are pending or will be initiated by the plaintiff, to withdraw from the registry of this Court said sum of Seven Thousand Five Hundred Forty-two and 42/100 Dollars ($7,542.42) received by the Clerk of this Court from defendant by order of this Court entered December 16, 1964 and held to the credit of this action and to pay therefrom (a) to defendant the sum of Sixty-five and 04/100 Dollars ($65.04) plus the amount of the cost of the proceedings in this Court assessed against plaintiff and (b) to plaintiff the balance of said funds.

Dated at Cleveland, Ohio, this 12th day of May, 1970.

BEN C. GREEN,
United States District Judge.

(Similar judgments in Cases Nos. C-63-314 thru C-63-323, inclusive, differing in amounts, have been omitted to avoid duplication.)

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING REHEARING.

(Entered: April 3, 1970.)

Before: McCree, Combs and Brooks, Circuit judges

Upon consideration, appellee's petition for rehearing is denied.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 19413

(Entered: February 6, 1970.)

BEFORE: McCree, Combs and Brooks, Circuit Judges.

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the record of the United States District Court for the Northern District of Ohio and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for proceedings consistent with the opinion.

It is further ordered that Defendants-Appellants recover from the Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

(s) CARL W. REUSS,
Clerk.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 19,413.

(Entered: February 6, 1970.)

(Entered in the District Court: April 17, 1970.)

Before: McCree, Combs, and Brooks*, Circuit judges.

Combs, Circuit Judge. The plant of Lakewood Manufacturing Company at Westlake, Ohio, was damaged by fire on October 3, 1961. Lakewood was insured under twelve separate policies of business interruption insurance written by the defendant insurance companies. The parties were unable to agree on the amount of business interruption loss resulting from the fire and, in March, 1963, the dispute was submitted to appraisal in accordance with a provision of the policies. On April 10, 1963, Lakewood filed separate suits on all twelve policies in the Common Pleas Court for Cuyahoga County, Ohio. The defendant companies caused eleven of the suits to be removed to the United States District Court for the Northern District of Ohio. The defendant in the twelfth suit is an Ohio corporation and that case was not removed. It is said in briefs that it is still pending in Common Pleas Court.

By appraisal award submitted on September 25, 1964, the umpire and one of the appraisers agreed that Lakewood's business interruption loss resulting from the fire was $152,177.11 plus $30,996.00 in expediting expenses. The total award was $183,173.11.

The eleven separate suits were consolidated in district court and, on the companies' motion, the issue of validity of the appraisal award was tried separately to the court.

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* Honorable Henry L. Brooks, then Chief Judge of the United States District Court for the Western District of Kentucky, sat on this case by designation.

The court held that the appraisal award of September 24, 1964, was "void and not a bar to the maintenance of these actions by plaintiff." Evidence on the amount of loss was later heard by the district judge and Lakewood's recovery under the policies was fixed at $277,787.00. This is a consolidated appeal by the insurance companies from the district court's judgment.

Lakewood manufactures a variety of machine parts primarily for sale to a few large customers. During the period here involved, the bulk of Lakewood's production consisted of pinsetter parts for its principal customer, the Brunswick Corporation. Parts were also manufactured for Otis Elevator Company and Cadillac Motor Company.

The fire started in the paint room and from there spread to the office, the tool room (used for maintenance and repair of production equipment), and the tool crib (the storage area for daily supplies). Because of the fire damage these facilities were relocated in other parts of the plant. Little damage was done to the actual production area or to machinery, and operations were resumed within forty-eight hours after the fire. But, operations admittedly were hampered during the succeeding three months' period—October through December, 1961—by reason of the fire damage. The effect of the fire on operations after that period is vigorously contested, primarily because on January 9, 1962, a strike occurred at Brunswick which lasted until April 6, 1962. During the course of the strike, shipments to and payments from Brunswick were drastically reduced although Lakewood apparently was not precluded from producing Brunswick parts and adding them to inventory in anticipation of future demands.

The insurance policies provide that, in the event of damage to or destruction of real or personal property by a peril insured against, the insurance company is liable

> "[F]or the Actual Loss Sustained by the insured resulting directly from such interruption of business, * * * for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property herein described as has been damaged or destroyed * * *."

It is stated in the appraisal award:

> "The umpire finds that the period from October 3, 1961 to May 2, 1962 was a reasonable time in which to rebuild the building and to move and relocate the machinery and equipment which had to be reconstructed and replaced on account of the fire on October 3, 1961, but must also recognize and find that the strike at Brunswick was the principal cause of the decrease of the sales value of production of Lakewood from January 9, 1962, and that this fact must be taken into consideration in the determination of the actual cash value of the loss sustained by Lakewood."

The appraisal team arrived at the amount of the award by using the potential production and actual profit figures submitted by Lakewood's appraiser for the period from the date of the fire to May 2, 1962. These figures were prorated, however, from the date of the fire to January 9, 1962, allowing a net profit rate of ten per cent. The effect of this computation was to terminate the period of business interruption loss on January 9, 1962, the date of the Brunswick strike.

The initial question, and we think the decisive one, is whether the district court erroneously set aside the appraisal award.

Generally, a court will not interfere with an appraisal award but, to the contrary, will indulge in every reasonable presumption to sustain it in the absence of fraud, mistake, or misfeasance. A court will not substitute its judg-

ment for that of the appraisers or set aside an award for inadequacy or excessiveness unless it is so palpably wrong as to indicate corruption or bias on the part of the appraisers. 44 Am. Jur. 2d *Insurance* § 1719 (1969).

The law of Ohio, applicable here, is essentially in line with the general rule. In Ohio, fraud or manifest mistake is a proper legal basis upon which to set aside an appraisal award. *Baltimore & Ohio RR v. Stankard*, 56 Ohio St. 224 (1897). To constitute manifest mistake, the mistake must be of such character that the arbitrator or appraiser would have corrected it had it been called to his attention; a mistake of judgment is not manifest mistake. *Pfleger v. Renner*, 13 Ohio App. 96 (1920). See *Bates v. Pennsylvania RR*, 26 Ohio L. Abs. 144 (App. 1937).

The district court's rationale in setting aside the appraisal award on the ground of manifest mistake is as follows:

> "If the actual loss sustained by plaintiff by reason of interruption of business caused by the fire had ended on January 9, 1962, an express finding of that fact should have been made by the umpire, and no determination of a fixed rebuilding period extending beyond that date would have been necessary. By reason of the fact that the only expressed time period found by the umpire was the reasonable rebuilding period, it is the Court's conclusion that the award must be construed as finding a period of business interruption as a result of the fire extending from October 3, 1961 to May 2, 1962, subject to the fact that the strike at Brunswick had to be considered in determining plaintiff's actual loss sustained.
>
> * * * * *
>
> "Had the umpire made a firm finding that the period of interruption caused by the fire ended on January 9, 1962 and that there was no actual loss sustained thereafter, that would present a question of

judgment which would not be subject to review by this Court. The award, as this Court believes it must be properly construed, having adopted the theory that the disruption of the plaintiff's manufacturing facilities as a result of the fire extended to May 2, 1962 and then having failed to consider that fact in arriving at the ultimate conclusion, is subject to being set aside by this Court."

This language indicates that, in construing the award, the district court considered only the actual wording of the award, ignoring the rule which required the ambiguity in the award be resolved in light of the testimony of the umpire and the appraiser who signed it. See *Aetna Casualty & Surety Co. v. American Surety Co.*, 64 F.2d 577 (4th Cir. 1933). It seems clear to us that the appraisal team found that the period of business interruption ended on January 9, 1962, and that Lakewood sustained thereafter no actual loss due to the fire.[1] This finding, which is implicit in the written award and explicit in their testimony, represents a question of judgment which may not lightly be set aside. The district court expressly recognized the rule but erroneously avoided its application, apparently because the award itself did not contain a "firm finding" to that effect.

Umpire Yoder and appraiser Butler both testified that, in making the award, they considered the reasonable rebuilding period to be from October 3, 1961 to May 2, 1962, but concluded that the actual period of business interrup-

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[1] The district court recognized that the policy provision providing that the insurer was liable only for such time as would be required with the exercise of due diligence to rebuild, replace or repair the damaged property was a cut-off date for liability, *Rogers v. American Ins. Co.*, 338 F.2d 240 (8th Cir. 1964), and that the length of the actual business interruption caused by the insured peril may be shorter than, equal to, or longer than the maximum period of liability under the insurance policy.

tion was from October 3, 1961 to January 9, 1962. The following testimony of umpire Yoder is illustrative:

> Court: If there had been no strike at Brunswick, what would the period of business interruption be? You say here from October 3, 1961 to May 2, 1962. Was that the period of interruption that you found, or was the period of interruption from October 3, 1961 to January 9, 1962?
>
> Witness: The business interruption, I would say, was to January 9th.
>
> Court: That is not what you say in your report, is it?
>
> Witness: I think I do, if not directly, then indirectly.

Umpire Yoder also testified that the appraisal award of $183,173.11 represented what he actually intended to award Lakewood as its total loss from the interruption due to the fire.

Appraiser Butler testified in a similar fashion:

> "Well, the period of interruption which we finally agreed upon, which was the length of time which would be required with the exercise of due diligence and dispatch to repair or replace the damaged facility was from October 3, * * * to May 2, 1962; but we found an intervening cause which limited the actual loss sustained until January 9, 1962."

The umpire and appraiser based their determination largely on the fact that in the three months immediately after the fire Lakewood produced at a rate well in excess of $300,000 sales value, whereas the sales value of production dropped significantly during the three months of the Brunswick strike, reaching a low of $72,000 in March, 1962; then, in April, the month the strike ended, sales value of production increased to more than $350,000. Moreover, Butler testified that interviews with employees

of Lakewood revealed that production operations were practically normal by December, 1961. Lakewood attempted to refute this by arguing that the decreased production during the months of the strike was due to inefficiencies caused by the fire. The appraisal team determined, however, that production was reduced due to the strike and that the fire did not impede production after January 9, 1962.

The district judge made the point that, even if it be assumed that the fire caused no loss of production after January 9, the award failed to consider whether the fire caused the plant to operate with less efficiency and more cost. But, the appraisal team testified they had not overlooked that possibility. The substance of their testimony is that any impediment of production after January 9 would have been insignificant and not measurable.

We conclude that the district judge erred in setting aside the appraisal award. The judgment is reversed and the cause remanded for proceedings consistent with this opinion.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

No. C-63-313.

(Entered: November 18, 1968.)

This action came on for trial before the Court, Honorable Ben C. Green, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiff recover from the defendant herein the sum of Eleven Thousand Four Hundred Thirty-six and 50/100 ($11,436.50) Dollars and costs.

Dated at Cleveland, Ohio, this 15th day of November, 1968.

BEN C. GREEN,

United States District Judge.

(Similar judgments in Cases Nos. C-63-314 thru C-63-323, inclusive, *differing in amounts*, have been omitted to avoid duplication.)

MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Nos. C-63-313 thru C-63-323, inclusive.

(Filed: October 30, 1968.)

GREEN, *J.*:

In a memorandum ruling entered September 18, 1968 this Court directed the parties to these actions to submit supplemental briefs on certain issues. Those briefs have been filed, and the Court may now proceed to a final determination of these cases.

It appears from the supplemental briefs that the parties are agreed that plaintiff's loss under conditions of total suspension would be less than the amount of loss computed by the Court and that the Court's findings of "actual loss sustained" does not exceed the limitation set forth in the policies restricting recovery to "the reduction in gross earnings less charges and expenses which do not necessarily continue during the interruption of business."

As to the application of the contribution clause to the award herein, plaintiff contends that it does not apply, whereas defendants assert that about a 2% reduction in the award should be made by reason of its application. Having examined the briefs, the Court finds that this disparity arises primarily from defendants' use of the sales value of production figures for the post-fire period as set forth in Schedule 21 of defendants' Exhibit GGGGG. The sales value of production figures from Schedule 21 are what have been referred to as "unpurified." It is the Court's opinion that plaintiff's calculation which is based on the refined figures for sales value of production for the period June, 1962 through September, 1962, as previously submitted to the Court, is correct, and that therefore the contribution clause of the insurance policies in suit does not apply to this loss.

Certain other questions have been raised and argued in the briefs. Only one of those matters warrants mention herein.

Defendants contend that the Court has partially duplicated plaintiff's award by granting recovery of $9,950 for "estimated office moving costs and rearranging tool crib and other factory areas." Defendants argue that the labor costs represented by this item have necessarily been included as a part of plaintiff's principal recovery.

Plaintiff points out, however, that these expenses were incurred during a period not covered by the Court's calculation of "actual loss sustained." As these costs properly represent expediting expenses the plaintiff is entitled to a recovery thereof.

The Court therefore finds that the plaintiff's total recoverable loss is $277,787. That amount must be apportioned among the defendants in these actions, taking into account the fact that part of the loss was insured under a policy not in suit herein. Counsel for the parties are directed to confer and agree upon a schedule of judgments to be entered in each of these actions based on the Court's findings, and forward the same to the Court by November 15, 1968; upon receipt thereof final judgment orders will be entered in each case.

This memorandum opinion, the memorandum opinion of September 18, 1968, the Court's oral opinion of January 19, 1968, and the memorandum opinion of July 25, 1967 are adopted as Findings of Fact and Conclusions of Law pursuant to Rule 52(a), Federal Rules of Civil Procedure.

MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Nos. C-63-313 thru C-63-323, inclusive.

(Filed: September 19, 1968.)

GREEN, *J.*:

This is the third stage of this litigation seeking recovery upon certain insurance policies issued by the defendant companies insuring the plantiff against loss by reason of business interruption at its premises at 25100 Detroit Road, Westlake, Ohio.

Plaintiff's claim arises out of a fire which occurred on October 3, 1961, while the policies were in full force and effect, which destroyed the office part of the plaintiff's plant and damaged that part of its manufacturing facilities containing its tool room and tool crib, destroying certain supplies, machinery and tooling equipment. Plaintiff claimed that this resulted in an interruption of its business and a loss of profits, which it seeks to recover in these suits.

On July 25, 1967 this Court entered a memorandum opinion setting aside an appraisal award fixing the plaintiff's recoverable loss under the policies in suit, as not having been made in accordance with the insurance contract between the parties. Trial was thus ordered on the merits.

On January 19, 1968, following the initial stage of the trial, the Court rendered an oral opinion from the bench on the issue of the length of time required by the insured, with the exercise of due diligence and dispatch, to rebuild, repair, or replace the property destroyed by fire. Under the terms of the insurance policies such time period constituted a limitation upon the plaintiff's right to recovery. The Court found that the period of interruption of business extended from October 3, 1961 to April 1, 1962.

The trial then proceeded on the issue of plaintiff's recoverable loss during the said period, and it is that issue which is now presented for decision.

Paragraph 2 of Business Interruption Form No. 4—which is the policy form involved in the instant case—provided that:

> In the event of such damages or destruction this company shall be liable for the **actual loss sustained** by the Insured resulting directly from such interruption of business, but not exceeding the reduction in Gross Earnings less charges and expenses which do not necessarily continue during the interruption of busi-

> ness, for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property herein described as has been damaged or destroyed.

Under this policy provision the Court must determine the "actual loss sustained" by the plaintiff.

In order to reach this determination it is necessary to set forth a short statement of basic historical information.

At the time of the casualty involved herein the plaintiff has recently expanded its plant facilities and had available to it a greater production capacity than at any prior time. Its principal source of business was the Brunswick Corporation for which the plaintiff manufactured parts for automatic pin-setters for installation by Brunswick in bowling alleys. In the summer of 1961 Brunswick's bowling equipment business exceeded original expectations for the period, producing a resultant increase in the plaintiff's production of parts for the automatic pin-setters. In the four months prior to the fire, the plaintiff's sales averaged in excess of $585,000 a month on a sales value of production of approximately $520,000 a month.[1] Those levels of sales and production represented record highs for the plaintiff.

The Brunswick Corporation had adopted a system of projecting yearly production for its suppliers, based on anticipated monthly and yearly total production estimates. In late 1961 Brunswick was projecting a 1962 build rate slightly in excess of 12,000 automatic pin-setter units for that year. That forecast was revised in early 1962 to just below 12,000 units for the year. In either

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[1] These average figures are based upon sales and sales value of production shown on schedule 11 of defendant's Exhibit GGGGG.

event, during the period under consideration, the plaintiff had from Brunswick an anticipated build rate of approximately 12,000 units for the year 1962. The sales value to the plaintiff on the Brunswick production was approximately $300 per unit.

In early January, 1962, during the period plaintiff was rebuilding its office and that part of its plant destroyed by fire, a strike occurred at the Brunswick plant. The testimony indicated that although contract negotiations had been under way at Brunswick, the occurrence of the strike was not expected. When the strike began Brunswick management did not anticipate that it would last for an extended period, and so advised the plaintiff. On February 16, 1962 Brunswick had advised its suppliers that it anticipated the strike would be settled before March 1, 1962, and a forecast of twenty working days at Brunswick was made for March. This same forecast projected an increase in the Brunswick build rate for March from 1,020 units to 1,200 units and an increase in April to 1,500 units for the month. The anticipated build rates for the months following were also set at high levels ranging from 1,140 units in May to 1,440 units in July back to a level of 1,140 units in September. The strike, however, did not end until April 6, 1962 and soon thereafter another unexpected development occurred.

In June, 1962 the bottom fell out of the bowling business. Without warning and totally contrary to all expectations the construction of new bowling alleys entered a period of severe decline. Brunswick's business was swept along in the general trend, and the plaintiff's business suffered in turn. By September, 1962 the plaintiff's sales had fallen to $193,898, although sales value of production still stood at $317,098. In succeeding months sales were $129,122, $101,853, $140,875 and bottomed at $38,135 in

January 1963. The corresponding figures for sales value of production were $114,213, $87,170, $40,416 and $43,702.[2]

Prior to the fire in October, 1961 plaintiff had been engaged in certain experimental research projects. Principal among these was the development of an automatic scoring device for bowling lanes, referred to as "Escore." There were other smaller research projects also under way at the time. During the period of interruption these projects were suspended and the personnel engaged therein either devoted their time to restoration and continuation of the plaintiff's manufacturing operations or, in the case of the actual research personnel, remained relatively idle until the projects were resumed. Although not particularly relevant hereto, the evidence indicated that following the period of interruption some of the smaller projects were not resumed or soon abandoned, although plaintiff did continue with the development of "Escore."

These are the basic background facts helpful to an understanding of the final conclusion reached herein.

In approaching the resolution of the question of "actual loss sustained" the Court has adopted a two-step procedure. The first issue to be determined is the probable production the plaintiff would have achieved during the period October, 1961 through March, 1962, had there been no fire. The second issue to be determined is the earnings that the plaintiff would have achieved on that production.[3]

It is the plaintiff's contention that the sales value of production during the period of interruption, absent the

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[2] The figures are set forth on plaintiff's Exhibit 44.

[3] Related to these two primary issues are certain other matters in controversy, such as the actual profit achieved by plaintiff in its operation during the period of interruption and the effect of tooling improvements scheduled for adoption during that time.

fire, would have been $2,250,000. Plaintiff argues that it had in hand total producible orders of approximately $2,306,000 from which that level of production could have been achieved.

It is the defendants' contention that the sales value of production during the period of interruption, absent the fire, would have been exactly the same as was actually achieved, $1,499,121.54, which will hereafter be referred to as $1,500,000. The defense contends that plaintiff achieved full production from the time of the fire to the beginning of the Brunswick strike and that any curtailment of production thereafter was solely a management decision attributable to the impact of the strike on the plaintiff's business. Defendants contend that plaintiff's losses are restricted to a slight increase in operating expenses due to the fire, plus a small amount for denied potential savings through tooling improvements.[1]

It is further the defendants' position that the plaintiff could not possibly have achieved a total production of $2,250,000 for the six-month period. The defense contends that the maximum sales value of production for orders which the plaintiff could have produced through March 31, 1962 was approximately $2,150,000.

The basis of the defendants' theory that the plaintiff sustained no loss in sales value of production is best exemplified by the testimony of their witness, Mr. Lowell A. Baker.[2] Although his testimony on the subject is vastly more detailed, Mr. Baker's reasoning can be restated very simply.

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[1] The losses under consideration are those directly related to the manufacturing operations. There are other items for which a right to recovery is claimed, some of which are admitted while others are in dispute.

[2] A summary calculation reflective of Mr. Baker's theory is found at schedule 7 of defendants' Exhibit GGGGG.

Mr. Baker made an analysis of the plaintiff's total shipping requirements for the months of October, November and December, 1961, which he calculated to have been $1,089,098. He next projected what he believed plaintiff's probable production would have been through December 31, 1961 in the absence of the fire. His estimate of probable production was $1,053,460. On the basis that plaintiff's actual production through December 31, 1961 was $1,024,102 he concluded that:

> * * * the indication was they produced almost the million dollars that the probable production would indicate they would produce, and at that point it seemed there were no production effects in total production, at least, due to the fire; that they were able to meet all their production requirements, and thus meet their shipping requirements.
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> * * * * * *
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> So the difference between the actual production in January, February and March, and the probable production, with consideration—pardon me—the comparison of actual production with the probable production in the absence of a strike would seem to indicate that it was the strike that caused the slowdown in production, and that is the assumption that has been made here.

Mr. Baker's detailed analysis did not follow this broad concept of "this is what Lakewood actually did and therefore it is what they should have done," but rather was based on a more sophisticated approach. He projected what he believed would have been the plaintiff's probable production during the six-month interruption period in the absence of both fire and strike. He then made a reduction in his projected figures for January, February and March, 1962 for what he considered to be the probable effect of the strike on the plaintiff's business. The final conclusion he

reached was that the plaintiff's probable production over the full six-month period, taking into account the Brunswick strike, would have been $1,499,244, whereas the actual figure was $1,499,681. In reaching this result Mr. Baker's projection reflects a rather anomalous figure of projected production for the months of January, February and March $30,000 less than was actually achieved during that period.

Mr. Baker's theory that the fire did not affect the plaintiff's ability to meet its production requirements is consistent with an assertion in the defendants' brief that the plaintiff failed to prove that the fire prevented it from achieving any additional production. It is argued by the defense that the plaintiff eventually fulfilled all orders which it had on hand during the period of interruption, and it therefore cannot be said that there was any loss in sales value of production. In support of that theory the decision of the Eighth Circuit Court of Appeals in *North western States Portland Cement Co. v. Hartford Fire Ins. Co.*, 360 F.2d 531 (1966) has been cited.

This defense represents what has been characterized during the course of this trial as the "recapture theory." This subject is considered by K. W. Withers in his book "Business Interruption Insurance, Coverage and Adjustment" at pages 114-115 and 134 and by Henry C. Klein in "Business Interruption Insurance" at pages 100-101. These authors appear to agree that in the case of a manufacturer who sells his goods shortly following their production, actual loss from business interruption is measureable on denied sales value of production. On the other hand, a manufacturer with an excess production capacity and no ready market for his goods may only suffer a deferment of income rather than an actual loss thereof as a consequence of an interruption of his business.

Taking into account the considerations agreed upon by these authors, this Court has concluded that plaintiff suffered an actual loss of sales value of production during the period of interruption, rather than a deferral of realization thereon. The plaintiff's production was geared to an immediate ability to sell. The products were manufactured for, and on the order of, specific customers. This was not a case of manufacturer producing a general product on the assumption that it could thereafter be sold on the open market.

To say that the plaintiff filled all orders is to ignore the obvious fact that this production in the post-interruption period was achieved at the expense of plaintiff's ability to devote its manufacturing facilities to other profitable uses. Defendants contend that in he post-interruption period no substantial amount of new business was realized by Lakewood, and therefore the Court should conclude that in the absence of the fire this same condition would have prevailed.

To accept the defendants' contention requires this Court to speculate upon what additional business the plaintiff might have secured if there had been no fire. The decision herein cannot be based on such conjecture. The record reflects that during the period of interruption the Otis Elevator Company put out for bid approximately $3,500,000 in new orders for products which the plaintiff could have manufactured. The record further reflects that Otis had previously invited Lakewood to bid on its orders, and that Lakewood had secured about 85% of the orders it had bid on. Mr. John F. Arrix of Otis testified that as a consequence of the fire Lakewood was not invited to bid on the new orders. If the Court were to engage in speculation as to the possibility of plaintiff obtaining further orders, this factor of the deprivation of the opportunity to bid on the Otis business would have to be included.

In this case the plain fact remains that the plaintiff had firm orders for goods which it could have produced during the period of interruption which were not produced at that time. To the extent that such failure of production was attributable to the fire the Court finds that plaintiff sustained an actual loss based thereon.

While it is true that the fire did not substantially damage the plaintiff's manufacturing facilities, the effects thereof created a dislocation and disruption which interfered with the normal continuance of manufacturing. Various departments were relocated. The destruction of the tool crib hampered operations. Storage of raw materials and finished goods had to be achieved on open ground outside the plant. Normal traffic flow could not be maintained. The record clearly establishes that the fire had a serious impact on the plaintiff's ability to conduct normal profitable operations. It does appear, however, that the effects of the fire increased from the period immediately succeeding the occurrence to some time in the early part of 1962 and then were dissipated as the restoration of the plant was completed. The reason for this rather peculiar curve pattern resides in the fact that as the need for storage of both raw materials and finished goods increased greater demands were made on available space, and as the weather conditions became more severe, operations both within and outside of the plant suffered therefrom.

The facts in the *Northwestern States* decision, relied upon by defendants, are not analogous to those herein. Therein the insured produced a product sold generally on the open market. It does not appear from the court's opinion that the thirty-three day partial shutdown of one of two plants operated by the insured caused an actual loss of salable production of finished goods. The court

found that the partial suspension deprived the plaintiff of a quantity of an intermediate component of the final product, but that the manufacturer was able to compensate for that inconvenience by utilizing stockpiled material. Under such circumstances there would be no actual loss sustained insofar as sales value of production was concerned.

Turning now to Mr. Baker's projection of plaintiff's probable production in the absence of the fire, the Court is unable to agree with his views relative thereto. The Court finds his concept of projected probable production to be unacceptable, in that it does not combine his calculations as to plaintiff's shipping requirements with a realistic view of the plaintiff's finished goods inventory requirements.

We must start with the fact that the plaintiff had a demonstrated ability to achieve a sales value of production in excess of $500,000 per month in its expanded plant, and had done so in the two months preceding the fire. The parties are in agreement that the plaintiff's profits on the $500,000 plus production were the highest in its history. The experts for the parties also agreed that the greater the plaintiff's production the higher its profits would be.[1] It would therefore be in the plaintiff's best interests to endeavor to maintain a production level at the highest dollar volume that its orders would warrant, absent any extenuating circumstances.

As previously noted, defendants' expert calculated plaintiff's shipping requirements for the months of October through December, 1961 to have been $1,089,098.

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[1] Although at some point the necessity to produce at premium pay rates would result in diminishing returns based thereon, increases in production at or about the $500,000 per month level would produce increased profits.

whereas his projected probable production of $1,053,460 for the same three-month period was $35,638 below that figure. Actual production for this period was $1,024,102. While the relative correlation of these figures might seem to indicate that a higher level of production should not have been anticipated, the question of finished goods inventory cannot be disregarded.

This matter of the development of an inventory of finished goods is related to the manner in which Brunswick's business was carried on. Brunswick's installation of new bowling facilities was essentially a seasonal operation, with its heaviest demands in the summer months. It was agreed by the various witnesses that the most efficient manner of operation for a supplier such as Lakewood would be to gear its production to a fairly constant monthly level based on the Brunswick yearly forecast and not to attempt to produce in response to Brunswick's fluctuating needs. This would mean that Lakewood should attempt to maintain a production of 1,000 units per month on a 12,000 unit yearly forecast.

While the record does not establish that the plaintiff actually followed such an ideal procedure, it does indicate that Lakewood did build a substantial inventory of finished goods in the early months of a year and then used that inventory to help meet its shipping requirements in later months. In 1961 Lakewood had a finished goods inventory of $363,922 as of April 30th. By September 30th that figure had been reduced to $7,933. In April, 1963, after the depression in the bowling construction industry had taken hold, Lakewood had a month end inventory of $152,514. By September 30th of that year the finished goods inventory had dropped to $42,824.

The significance of this need for a substantial inventory early in a calendar year and the plaintiff's historical

response to the same has been left out of the defendants' projection.

In the three months October through December, 1960 the plaintiff increased its finished goods inventory by approximately $120,000 and entered 1961 with a finished goods inventory of $201,309. That finished goods inventory increased to $304,545 by the end of March, 1961 and stood at $363,922 on April 30, 1961.[7]

Under the defendants' projection only $50,000 worth of sales value of production would be added to finished goods inventory for the period October through December, 1961, for a total year end inventory of about $58,000. On that same projection the plaintiff's finished goods inventory as of March 31, 1962, the end of the period of interruption, would be about $258,000. The defense is therefore asking the Court to accept as probable projected production an estimate which would leave the plaintiff's finished goods inventory as of January 1, 1962 approximately $140,000 behind the level of January 1, 1961 and $50,000 lower than the year previous as of March 31, 1962. Such a projection cannot be reconciled with the facts that as of January 1, 1962 Lakewood had a forecast from Brunswick of an anticipated production for that year at about the same total volume as had been predicted for 1961, and that as of March 31, 1962 Brunswick was forecasting an accelerated production schedule to compensate for the strike. A prudent manufacturer would have controlled his stockpile of finished goods inventory, taking into account the demands which would be made upon him as a result of those factors.

It is this Court's conclusion that, absent the fire, the plaintiff would have produced in excess of the actual pro-

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[7] Defendants' Exhibit GGGGG, Schedule 11.

duction of $1,500,000 in sales value of production during the period of interruption in order to restore its depleted inventory of finished goods and that it would have produced to a level sufficient to provide a hedge against Brunswick's increased demands upon the conclusion of the strike.

The defense has calculated the plaintiff's total shipping requirements for the months of October, November and December, 1961 to have been $491,550, $285,248 and $312,300 respectively.[9] Based thereon the Court believes that a reasonable probable production for those three months would have been $500,000 for October, $400,000 for November and $300,000 for December.

A production level of $500,000 for October would permit the plaintiff to meet all its shipping requirements for that month and add a small amount to inventory.

Although plaintiff's shipping requirements for November were only $285,248, it would be necessary for the plaintiff to account for a portion of its December production in November. The reason for that was the fact that the plaintiff traditionally worked only three weeks in December, closing its plant for a week at the holiday season. This factor was recognized by Mr. Baker in his projection of production.[10] The Court believes that a $400,000 level for November would be adequate to meet all of Lakewood's immediate needs, get ahead for December and add some product to finished goods inventory.

For December a $300,000 production would meet all shipping requirements and produce a three-month total of production of $1,200,000. That would be approximately

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[9] Defendants' Exhibit GGGGG, Schedule 8.

[10] See footnote B to Schedule 7 of defendants' Exhibit GGGGG.

$110,000 in excess of plaintiff's $1,090,000 shipping requirements for that period, which additional production would go into inventory.[10] Actual finished goods inventory as of December 31, 1961 amounted to $55,839. Adding the projected $110,000 excess would produce a projected finished goods inventory of $166,839 as of that date. This level is less than that for January 1, 1961.

As of January, 1962, the plaintiff contends that had the fire not occurred it would have achieved a production of $350,000.[11] In his projection of plaintiff's probable production Mr. Baker initially projected a production of $342,929, but then reduced that figure by $100,000. His position was that the $100,000 reduction was necessary to account for the strike.

The Court does not believe that the plaintiff would have made any reduction in production for the month of January, 1962 in response to the strike. As of January 1, 1962 there was no expectation that any strike would occur at Brunswick, and therefore the plaintiff would have been justified in scheduling production at the $350,000 level for the month suggested by Mr. Baker. Raw materials and supplies would have been purchased in anticipation of such production. When the strike actually began on January 9, 1962 the plaintiff was informed that Brunswick expected a very early end thereto. Further, although Brunswick advised all its suppliers, including the plaintiff, to discontinue shipments until further notice, none of the suppliers were advised to suspend production based

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[10] It is possible that such excess production could have been shipped, for the evidence indicated that Brunswick would have accepted up to a 10% additional shipment on its orders. For the purpose of this opinion, however, it is assumed that all excess production would be added to finished goods inventory.

[11] Page 29, plaintiff's principal trial brief.

upon Brunswick's prior release schedules.[12] The sales value of production actually achieved by the plaintiff in January, 1961 was $278,217. Taking these factors into consideration the Court believes that it would have been reasonable for the plaintiff to achieve a $350,000 sales value of production in January, 1962 had the fire not occurred.

For the months October, 1961 through January, 1962 the Court's conclusions as to probable production in the absence of the fire are the same as those advocated by the plaintiff. The Court is unable to agree with plaintiff's contentions as to the months of February and March. It is plaintiff's claim that a $350,000 level of production would have been maintained for each of the said months. The actual figures based on sales value of production were $144,168 in February and $72,692 in March.

If the plaintiff's theory were to be accepted there would be a total addition to sales value of production for the six months of the period of interruption of approximately $750,000. Virtually all of that amount would have to be allocated to finished goods inventory. Based upon plaintiff's actual March 31, 1962 finished goods inventory of $255,140 that would produce a projected finished goods inventory of about one million dollars at sales value. The

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[12] Brunswick dealt with its suppliers on the basis of orders having three release dates. The supplier would receive an order for a given number of parts. The order would contain one release date for purchase of raw materials, as of which date the supplier could buy his materials and Brunswick would be obligated to pay for them plus a percentage over cost price. The second release date was a fabrication release. As of that date the supplier was authorized to proceed with the manufacturing process and Brunswick was thereafter obligated to buy the finished product. The final release date was for shipping. Once a fabrication release was issued Brunswick had to take the finished goods, but it did have the right to extend a previously scheduled shipping date for such goods.

Court does not believe that such a projection can be reconciled with the record herein.

Beginning around February 5, 1962 the plaintiff cut back its work week to a three-day week. Plaintiff contends that the reason for this cut-back was that it was losing money on its production due to inefficiencies caused by the fire.

The defense contends that the only reason for the curtailment of Lakewood's production was the Brunswick strike and the consequent shut-off of Brunswick money that the plaintiff needed in order to operate.

There is no doubt that the plaintiff was suffering from a shortage of operating capital during this period. Mr. Stephen Peplin, President of the plaintiff, testified that he had calculated that the plaintiff's net asset position had dwindled from about $384,000 in October to $49,000 by the end of December, 1961, and that the February, 1962 cut-back was because the plaintiff was out of funds. It is also obvious, however, that the plaintiff's cash position was seriously hurt when Brunswick shipments were suspended after January 9, 1962.

The record indicates that there was a dispute between plaintiff and the adjuster for the defendants as to who should pay the interest on any loan the plaintiff might make to obtain additional operating capital. While it appears that such dispute may have influenced the plaintiff's decision not to make such a loan, the Court finds that Mr. Peplin honestly believed that as a result of inefficiencies caused by the fire his operations in 1962 were costing him money and that such belief was a factor in the production cut-back. The Court is further of the opinion, however, that the Brunswick strike would have had an impact on the plaintiff's business decisions under any circumstances.

The plaintiff offered testimony from two categories of

witnesses in an effort to prove that it should have operated at full production during February and March, 1962 despite the Brunswick strike. Operators of other machine shops testified in response to hypothetical questions, and stated the belief that under a state of facts reflecting the basic circumstances herein a reasonably prudent manufacturer would have run all orders he had on hand and when those were exhausted look elsewhere for new business. Actual suppliers of Brunswick were called, and testified that they maintained regular production schedules for Brunswick orders during the strike period.

The difficulty with applying the testimony of the other manufacturer witnesses to project plaintiff's probable production is that the Lakewood operation was conducted under a business philosophy characterized by Mr. Peplin as unique. He testified that:

> * * * our practice has been, rather than have a lot of customers, we actually went out to try to sell the capacity of our whole plant to one or maybe two customers, and not maybe more than three or four.

The history of the plaintiff corporation confirms that this concept was in fact followed. The Court believes that such a method of operation must be given recognition herein.

On February 16, 1962 the plaintiff was advised that Brunswick expected the strike to end soon, and that for the following months a heavy production schedule would be maintained. Much of the tooling used by plaintiff for the Brunswick production was custom designed for a special purpose and not of general utility. It is this Court's belief that the plaintiff, with its unique business philosophy, would have continued to produce Brunswick parts on a limited basis for a reasonable period of time rather than attempt to exhaust its Brunswick orders and secure small jobs to fill in the anticipated short period of time before Brunswick was back in full operation.

The Court has therefore concluded that in the absence of the fire the plaintiff would have reduced its production in response to the Brunswick strike, although not to the levels of the actual production for February and March, 1962.

The Court has projected a probable production through the end of 1961 which would have resulted in an inventory of finished goods as of January 1, 1962 of approximately $167,000. The projection of $350,000 worth of production for January, 1962 is approximately $72,000 more than production actually achieved during that month, which amount must be allocated to finished goods inventory. Plaintiff's finished goods inventory actually increased by about $148,000 in January. Therefore, on this projected basis finished goods inventory must be increased by $220,000 for January, for a projected inventory at the beginning of February of about $387,000.

With this figure in mind, the Court believes that the plaintiff would have initially set its production levels at no more than $300,000 for the month of February, based on Brunswick's prediction of an early end to the strike, and then gradually cut back on production as inventory mounted and the strike progressed. The Court is of the opinion that a reasonably prudent person in the plaintiff's position would have geared production so as to limit inventory by the month's end to no more than a two months' stockpile, which would be about $600,000 at sales value. On that basis, a $250,000 production for the month would create an addition to inventory of approximately $169,500,[13] for a month end inventory of approximately $556,500.

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[13] The figure of $169,500 is based upon an actual inventory increase in February, 1962 of about $63,500 plus the projection of a sales value of production $106,000 greater than actually achieved during the month.

Entering March the plaintiff would be faced with several dilemmas. The Brunswick strike, to which an early end had been predicted several times, was about two months old, and when it would end could not be foreseen. The shut-off of Brunswick cash would have severely affected plaintiff's net asset position by that time. The stock of raw material actually available for consumption would be low.[11] If plaintiff were to continue operations at a high level it would in all probability have to borrow money to do so.

Under those circumstances the Court believes that plaintiff would have operated in March at about its break-even point on manufacturing operations, which the evidence indicates to be about $160,000 sales value of production. The basis for this is that the plaintiff could have kept its work force occupied and intact, a matter over which Mr. Peplin expressed some concern, limited the growth of its inventory, and yet not have lost money on its operations. By this time an attempt to limit the finished goods inventory would be economically sound. As previously noted, plaintiff's profits increased with its production. If plaintiff got too far ahead in inventory build its production in the post-strike period would have to be lessened. By sacrificing production which would be achieved at a low level of profit in one period the plaintiff could defer that production to a later time and build profits thereon. It must also be considered that while the strike ended April 6, 1962, the plaintiff did not know in March when the strike would end and was faced with the prospect

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[11] Although plaintiff's books would indicate a ready supply of raw materials the figures are misleading. Under plaintiff's accounting system raw materials were not costed out until the time of sale. In actuality a major portion of the raw materials on the books would have been consumed in finished goods which were stockpiled.

of continuing to produce with the bulk of its finished goods going into inventory. It is the combination of all these factors that has led the Court to conclude that plaintiff would not have manufactured at a level beyond its break-even point.

At a $160,000 level of production, finished goods inventory would increase at approximately $74,500 for the month of March. This is based on an approximate $87,000 increase in projected production over actual production of $72,000 coupled with an approximate $12,500 actual decrease in inventory during the month. The plaintiff would thus enter April, 1962 with a finished goods inventory of approximately $631,000.

The Court believes that a $631,000 finished goods inventory as of April 1, 1962 would be both reasonable and feasible under the circumstances of this case. For that time of the year a month's inventory of finished goods would be normal. It may be noted that on April 1, 1961 the finished goods inventory stood at $304,545, just about one month's sales value of production based on 12,000 units per year to Brunswick. Plaintiff would thus have a hedge against the strike of about $326,500 worth of inventory in excess of the normal one-month stockpile. That level would permit the plaintiff to operate at a fairly high and profitable rate of regular production in response to Brunswick's projected build rates for the succeeding months and still consume the finished goods inventory within a reasonable period.

As to the feasibility of building such an inventory, the Court believes that it could have been accomplished without plaintiff being put in a position of financial crisis. Although plaintiff's net cash asset position was weak as of the end of January, 1962, it would have been in a much better position if there had not been a denial of a

portion of production in October through December, 1961 and if earnings on the production actually achieved had been normal. The Court is of the opinion that with the raw material inventory plaintiff had on hand an inventory of $631,000 could have been achieved from plaintiff's own resources, although at that point plaintiff would in all probability have been stretched very thin.

It is therefore this Court's finding that in the months of October, 1961 through March, 1962 the plaintiff's probable production in terms of sales value of production, taking into consideration the strike at Brunswick, would have been as follows were it not for the fire at its plant:

October	$ 500,000
November	400,000
December	300,000
January	350,000
February	250,000
March	160,000
	$1,960,000

The next issue is the "actual loss sustained" by plaintiff based upon the above projection of probable production.

In their presentations herein the parties have set forth their contentions as to "actual loss sustained" using their theories as to the probable production as a base point. Plaintiff's claim thus proceeds from an assumption of $2,250,000 in production, whereas the defendants' computation is based on a production of $1,500,000 for the same six-month period. At the request of the Court, the parties have submitted calculations as to what loss they contend the plaintiff would have sustained at levels of production increasing from $1,500,000 in steps of $250,000 each.

There is a major difference in theory between plain-

tiff and defendants in this area, having to do with an allocation of expenses.

As previously mentioned, prior to the fire plaintiff had several research and development projects under way, which were discontinued during the period of interruption. In its presentation to the Court, the plaintiff has adjusted its expenses in the pre-fire period to eliminate these R & D expenses[15] as a charge against manufacturing. For instance, in the four months prior to the fire total payroll for toolmakers was $27,856. In calculating profits on manufacturing operations for the said period plaintiff only included $13,928 as an item of expense, on the basis that 50% of the toolmakers' time was devoted to R & D. This allocation of expense would, of course, increase the plaintiff's paper profit on manufacturing in an amount identical to the eliminated expense. In the interruption period 100% of the toolmakers' pay was allocated to manufacturing on the basis that they were spending all of their time in maintaining the general production as a consequence of inefficiencies caused by the fire.

The defendants contend that this method of accounting is improper, and in their calculations have included all items of expense as a charge against manufacturing in both the pre-fire period and the period of interruption.

The theoretical basis for this allocation of expense between R & D and manufacturing was explained by plaintiff's witness, Mr. Walker Roberts. He testified that there are two theories concerning such expenses:

> The first theory is that research and development for specific projects which are under development would be capitalized and charged against the income derived from those specific projects.

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[15] During the trial expenses related to the research and development program were referred to as R & D, and will be so denominated herein.

> The other theory is that research and development is a continuing cost of a company regardless of the products that come out.

He further testified that the capitalization approach is proper when a company is engaged in specific research projects and that the continuing expense approach should be applied to a company which has a research and development department or personnel engaged in continuous research work.

On cross-examination of the defendants' witness, Mr. Richard Greenberg, he stated that if research expenses were to be capitalized upon the completion of the project to which they were related they could not be considered as a manufacturing expense.

Taking into account the views of these witnesses, the Court believes that the plaintiff is justified in allocating R & D expenses for the purpose of determining its manufacturing profits herein. The record indicates that plaintiff did not maintain a regular research department, but rather had specific personnel working on individual projects, so that the capitalization method would be appropriate with regard thereto. There is an additional reason why an allocation of R & D expenses is appropriate herein. In the context of this action to recover an actual loss sustained by reason of business interruption, the Court cannot compensate the plaintiff for the effects of the fire on R & D programs. It should therefore follow that plaintiff would not be charged with the expenses related to such programs for the purposes of these actions.

The Court has therefore determined to adopt the plaintiff's theory of allocating R & D expenses, but with one major variance therefrom. Plaintiff's Exhibit 45-C is reflective of the manner in which the R & D allocation

for the four months prior to the fire was calculated. A major item therein is a charge of $13,333.34 labeled "Officer's salaries." It was determined that this item represented 50% of the salary of Mr. Stephen Peplin for the four-month period; and was based on the contention that Mr. Peplin devoted about half his time to R & D work.

At that time Mr. Peplin was the chief executive and operating officer of the corporation. He had virtually built it from the ground up, and as it became more successful he turned some of the executive and administrative detail over to his two sons who had also come into the business. The evidence is clear, however, that he was the controlling force in the company and devoted his time and talents to whatever problem presented itself at any given time. He had a natural inclination toward invention, and did devote a considerable amount of his time in that direction. However, if there were no R & D programs his services could not be dispensed with, as would be the case with other personnel either directly or indirectly working with the R & D programs. It is this Court's opinion that considering the position of Mr. Peplin in the development and continuing operation of the plaintiff his total salary must be considered as a charge against the plaintiff's general operations, and plaintiff's allocation of R & D has been adjusted by the Court by excluding therefrom the item of "Officer's salaries."

This failure of allocation between R & D and manufacturing expense in the defendants' theory of loss sustained would militate against the adoption of their theory by the Court. There is, however, a more compelling reason for rejection of the defendants' theory. Defendants' basic premise is that plaintiff's actual loss on manufacturing operations for the six-month period is represented by $13,407 in excess overtime payroll during the month of

December.[16] It is this Court's opinion that on the record herein that contention is unrealistic and cannot be adopted by the Court.

The Court is also unable to utilize the plaintiff's theory as to calculation of actual loss sustained. The plaintiff's method of computation is reflected in the Schedule B series to its exhibits 45, 47 and 49 and exhibits 54 and 55. Each of these calculations takes the accounting figures for the plaintiff's operations for the four months prior to the fire and then projects those figures forward on a constant percentage ratio basis for the assumed levels of production. The flaw in this theory is that the four months before the fire was the period of the plaintiff's greatest profits on a monthly average production in excess of $500,000. The Court does not believe that cost and profit percentages generated during this peak period can properly be applied to a projection over a six-month period with projected production ranging from $500,000 a month to $160,000 a month and averaging about $317,000 a month.

The Court has thus been required to develop an independent approach to the solution of this problem. Fortunately, there is information before the Court on which the parties are in rather basic agreement which has provided the tool for that task.

As previously mentioned, the Court at trial requested each of the parties to submit schedules as to the plaintiff's potential loss of earnings at various levels of production. When the said schedules were submitted it developed that each of the parties was projecting a straight-line increment in dollar earnings based on increases in sales value of production. The plaintiff's calculation reflected an increase

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[16] This loss on manufacturing operations is one of several elements included in defendants' overall calculation of plaintiff's right to recover herein. See defendants' Exhibit GGGGG, Schedule 1.

in earnings of $71,078.91 per $250,000 increase in sales value of production, whereas the defendants' increase was calculated at $65,315.00 per $250,000 in production. Thus, although there was a slight difference in amount, the parties were in agreement with regard to the fact that there was a definite correlation between increased production and earnings.

There is another area of basic agreement in the record, and that pertains to the plaintiff's break-even point excluding R & D expenses. This question was gone into on cross-examination of defendants' expert, Mr. Baker, and the figure of $160,000 sales value of production was estimated to be the plaintiff's break-even point. That conclusion was arrived at in the following manner. Using the data contained on plaintiff's Exhibit 49-B Mr. Baker estimated that 60 cents of every dollar of plaintiff's sales value of production represented the cost of raw materials, subcontracts and supplies. He further estimated that 11 cents of every dollar would be consumed by direct and indirect labor. Although during the trial there was some variation on the question of raw material costs and labor costs, both on an actual and theoretical basis, these estimates are reasonably close to the percentages normally generated by the plaintiff in its manufacturing operations. Mr. Baker, then calculated all other salaries and wages to be $27,400 a month, but this figure included only half of the monthly salary of Mr. Stephen Peplin. Fixed expenses were estimated at roughly $14,000 per month, with variable expenses of about $5,000 per month. This totals $46,400 per month in expenses to be met with the remaining 29 cents per dollar of sales value of production above the cost of materials and labor. Twenty-nine percent of $160,000 is $46,500, thereby proving out the calculation of break-even made by Mr. Baker.

For the Court's purposes, however, there must be added to the $46,400 fixed expense figure the excluded portion of Mr. Stephen Peplin's salary which the Court has determined not to be a proper charge to R & D. Mr. Peplin earned $80,000 per year, so that one-half of his monthly salary would be $3,333. The Court has therefore adopted the figure of $50,000 per month as representing the plaintiff's fixed manufacturing expenses.

The method by which the Court has approached the question of plaintiff's actual loss sustained has been to combine this calculation of the plaintiff's fixed expenses with a straight-line projection of income increment based on production. Consequently, it is necessary for the Court to resolve the variance between the plaintiff's estimate of $71,078.91 and defendants' estimate of $65,315.00 increment of income per $250,000 sales value of production.

The variation of $5,763.91 between the plaintiff's and defendants' increment calculation is explained in defendant's Exhibit LLLLL. It appears that the major dollar differences reside in the treatment of expense items for depreciation, repairs to machinery and travel and entertainment. Having reviewed the testimony of the various experts on this issue, the Court has concluded that the accounting treatment of most of the disputed items accorded them by plaintiff is essentially correct. The Court has therefore adopted for the purposes of the decision herein, the figure of $70,000 income increment per $250,000 sales value of production. On the agreed fact that income progression is straight-line that figure can be divided into smaller units, such as $14,000 per $50,000 or $2,800 per $10,000.

Combining this projection of income based on production less plaintiff's fixed expenses, the Court is able to project a dollar profit at varying levels of production. For

example, at $250,000 sales value of production $70,000 in income would be produced from which $50,000 in fixed expenses would have to be paid, for a net profit of $20,000. At $400,000 sales value of production income would be $112,500, fixed expenses $50,000, net profit $62,500.

This method of income projection can be shown to be reasonably related to plaintiff's actual historical experience. The method is subject, however, to an adjustment in order to conform it with plaintiff's actual earning experience, both before and after the period of business interruption.

In the four-month period before the fire plaintiff's sales value of production was $2,059,545.72, for a monthly average of approximately $515,000. The plaintiff's net income during that period, as shown on plaintiff's exhibit 54, was $382,327.76. From that profit figure must be deducted $13,333.34, representing the salary of Mr. Stephen Peplin allocated to R & D, producing a net figure of $368,994.42 for a rough monthly average of $92,250 profit.

The Court's method of income projection on a $515,000 production would produce a monthly profit of $94,200. Translated to percentages, actual profit was roughly 17.9%, whereas the Court's projection is roughly 18.3%.

The record herein as developed at the trial contained accounting data regarding the four-month period June through September, 1962, defendants' Exhibit GGGGG, Schedule 21. Schedule 21, however, was not prepared on the basis of allocation of expenses to R & D. The Court therefore requested plaintiff to prepare a schedule for that period with an allocation of expenses. Such a schedule was submitted and has been filed as a part of this record. In addition to allocating R & D expenses other adjusting entries are contained on the said schedule to bring the

presentation into line with other accounting schedules submitted during the trial. From this accounting schedule it appears that plaintiff's four-month sales value of production from June 1, 1962 through September, 1962 was $1,443,450 with a net income from operations after allocation of R & D expenses of $194,238.[17] Dividing these figures to a monthly basis generates average production of approximately $360,860 and average net income of approximately $48,560. On the Court's projection basis a $360,000 monthly production would yield a net income on operations of $50,800. Translated to percentages, actual historical experience shows a percentage profit from manufacturing of approximately 13.5%, while projected profit is approximately 14.1%.

It thus appears that the method of projecting income on the basis of a $70,000 increment per $250,000 sales value of production produces net income percentages slightly higher than historical experience indicates should be anticipated. It is therefore necessary to make an adjustment in this theory of straight-line dollar projection in order to conform it more accurately to historical experience. As the deviation noted is based on relative percentages of earnings to sales value of production it is possible to compensate for these differentials by reducing the dollar income projected on the $70,000 per $250,000 basis by a percentage of sales value of production. The variation for the pre-fire period is 0.4% and for the post-fire period 0.6%. The Court has therefore determined to adopt the mid-point of 0.5% as the adjusting factor to be applied to

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[17] The net income from operations figure is arrived at by taking the net income figure of $221,568 shown on plaintiff's exhibit and deducting therefrom $17,330 items of expense captioned "Non-normal expenses from insurance adjustment procedures" and $10,000 of salaries allocated to R & D as officer's salaries.

sales value of production in order to conform the income projection to actual historical experience.

On this basis, net income for a month is first projected on any given level of sales value of production by computing earnings thereon at $70,000 per $250,000 worth of production. From the earnings figure so derived $50,000 is deducted for fixed expenses. A second deduction of 0.5% of sales value of production is then made, and the balance represents the projection of net income.

Applying this method of computation to the production previously projected herein produces the following results:

Month	Projected Production	Projected Earnings
October	500,000	87,500
November	400,000	60,800
December	300,000	32,400
January	350,000	46,200
February	250,000	18,750
March	160,000	0
	$1,960,000	$245,650

There is one other area of loss directly related to production, being potential savings through tooling improvements. The record indicated that at just about the time of the fire the plaintiff was about to adopt certain tooling changes which would have reduced its costs on some Brunswick parts. Although part of that savings was to be passed on to Brunswick, some increased earnings to the plaintiff would have resulted therefrom.

The defendants have conceded the theoretical validity of this claim, and allowed plaintiff $4,360 for tooling improvements on their schedule of loss. That allowance is predicated on defendants' theory of no loss production.

and is reflective of denied savings on parts actually produced. It also includes a 60% factor for overhead savings.

The plaintiff's basic claim for savings denied from planned tooling improvements was $33,160 based on a $2,250,000 level of production. The plaintiff's computation is based on a 100% overhead factor. It is this Court's opinion that the 100% overhead factor is more in line with the plaintiff's general business approach to overhead as shown on the record and it will be adopted herein by the Court in computing the denied savings of planned tooling improvements.

It appears that for the most part the planned tooling improvements were to have been put into effect in early October, 1961. It further appears that of ten planned tooling changes eight were completed by January 1, 1962. It thus appears that the bulk of any loss caused by the delay in adopting such changes is restricted to the production actually achieved by January 1, 1962 plus the $150,000 sales value of production projected as denied up to that date. Taking the defendants' $4,360 figure and adjusting it for a 100% overhead factor produces a result of $5,450 denied savings on actual production. Plaintiff has projected denied savings of $5,760 on a sales value of production of $150,000. These two items total $11,210. As this record does not afford an accurate method of computing denied savings on possible additional production of parts on which the tooling changes did not take effect until after January 1, 1962, the Court must adopt this figure of $11,210 as plaintiff's recovery based on denied savings from tooling improvements. This amount should be added to the previous projection of earnings in order to arrive at a projection of plaintiff's probable total net income.

It is therefore this Court's conclusion that plaintiff's

net income from manufacturing operations during the period of interruption in the absence of fire, but taking into account the Brunswick strike, should have been $256,860. To determine plaintiff's actual loss sustained, any profit achieved during the period of interruption must be offset against the projected earnings.

Plaintiff's schedules show actual total net income during the said period of $22,482. The defendants' schedules reflect earnings of $41,043. The $18,560 difference in the calculations of the parties as to net income from manufacturing can be identified in their respective accounting schedules, and arises from a difference in treatment as to the scrap factor in the cost of raw material.

There is much testimony in the record regarding the scrap factor issue, and much confusion was admitted to by all concerned. The basic exhibit concerning this question was plaintiff's exhibit 45-2. Having reviewed the said exhibit and the record pertinent to this question, the Court is in agreement with the defendants' contention that the plaintiff's approach to the calculation of an increased raw material cost based on the scrap factor was improper. While there is no doubt that plaintiff's operations during the interruption period must have generated some excess scrap, the proof of additional raw material cost based thereon is not sufficient to permit the Court to make a finding of the cost of raw material in excess of that originally calculated by plaintiff as shown in its exhibit 45-2. Therefore, the Court must adopt the defendants' views on this issue, and find that the plaintiff's actual earnings during the period of interruption were $41,043.

Having projected a probable net income from manufacturing operations of $256,860 as against actual earnings of $41,043, it follows that the plaintiff's projected loss of earnings is $215,817.

The parties have agreed that the plaintiff incurred $34,099 in expediting expenses, and such amount must be included as a part of the recovery by plaintiff.

Plaintiff also claims the right to recover $44,596 for overtime payroll to supervisory personnel and $1,088 for a protective covering erected while the building was being repaired.

As to the protective covering, the Court believes that it is a proper expediting expense. It was not included in the amount recovered under plaintiff's fire insurance policies and recovery of the $1,088 will be allowed herein.

The question of the overtime payment to supervisors is a seriously disputed item.

Defendants contend that this item does not represent a legal obligation of the plaintiff arising from the fire. It is defendants' position that plaintiff never intended to pay this claim for overtime to supervisors out of its own funds, and only intended to pay it if a recovery therefor was had from the insurance companies. Defendants further argue that plaintiff's supervisors were historically compensated for overtime work on the basis of a bonus keyed to earnings rather than on the basis of hours worked. Defendants further contend that plaintiff's recent resumption of payments to supervisors was solely for the purposes of developing a favorable trial record.

Plaintiff contends that this item has always been considered an outstanding legal obligation of the company, and that it had always been its intent to pay the same in full. While recognizing that the strict hourly overtime method of compensation for supervisors was a deviation from past practice, plaintiff argues that because of the unusual circumstances attending the additional overtime work of the supervisors, it was the only fair method of payment. Although conceding that following a payment of about $7,000

to supervisors soon after the fire no further payments were made on the overtime claim until shortly before this trial began, plaintiff contends that this was due to the fact that its financial position in the intervening period would not permit further payments. Plaintiff points out that the liability was accrued on the company's books and has been continuously carried thereon and also was claimed as a deduction for income tax purposes. It is the plaintiff's position that the recent resumption of payments to supervisors based on the overtime claim is a bona fide recognition of its legal obligation.

It appears from the record that prior to the fire plaintiff's supervisors were not compensated for working overtime hours strictly on the basis of hours worked. It further appears that it was not unusual for supervisors to work a 54-hour week, and in periods of high production their hours worked would exceed 54 per week. Mr. Stephen Peplin testified that he considered a 40-hour work week as the base period for supervisors, while conceding that a 54-hour week was actually generally the case. He stated that the supervisors were compensated for all hours over 40 in the form of a "discretionary bonus" and that hours worked, either over 40 or over 54 per week, was one of the factors taken into account in determining the bonus for each supervisor. Hours worked were not the sole criteria, and Mr. Peplin stated that many factors were taken into account as to each of the supervisors individually. Most important, this "discretionary bonus" was based upon the company's profit, and was calculated quarterly based upon earnings for the relevant three months. Although not specifically referred to as such, and although not based on any fixed formula, it appears to the Court that this "discretionary bonus" was in the nature of a profit sharing plan.

Plaintiff's exhibit 46-B is an itemized calculation of overtime hours for each of the plaintiff's fourteen supervisors. It appears therefrom that the supervisory staff did work excess overtime in the period after the fire,[18] which the Court believes would reasonably be attributable to the effects of the fire.

The Court does not believe, however, that plaintiff is entitled to a recovery of the full amount claimed for supervisors' overtime. As stated, supervisors were normally compensated for hours over 40 by means of the "discretionary bonus" paid from company profits. Because plaintiff's profits and net cash assets were diminished following the fire, plaintiff could not pay the customary bonus.

The purpose of the basic award made herein of "actual loss sustained" is to make the plaintiff whole for the damage sustained by reason of the fire. The entire concept is to compensate the plaintiff and restore its profits to the same level as if the fire had not occurred. Out of such profits plaintiff would normally have paid the "discretionary bonus" to supervisors. To award plaintiff an amount representing denied earnings and also the entire amount of the supervisory claim would be to grant plaintiff a windfall in the amount of the bonus customarily paid out of earnings.

It is this Court's conclusion that for the months of October, 1961 through February, 1962 the plaintiff should be required to compensate its supervisors for overtime up to the normal 54-hour week out of its recovery of denied earnings. On the basis that hours over 54 represent a response to the fire inefficiencies, the Court will permit

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[18] The Court has prepared an appendix based upon plaintiff's exhibit 46-B reflecting the weekly hours over 40 worked by each of the supervisors. The columns in the Court's exhibit follow the order of exhibit 46-B and the initials of each supervisor appear over the tabulation of hours worked.

recovery for overtime based on such excess for the months of October, 1961 through February, 1962.

The Court is including no recovery based on overtime in the month of March, 1962. The reason for that is that the Court has projected a level of operations at the break-even point for March and, thus, on the traditional "discretionary bonus" basis there would have been no earnings on which such a bonus would have been paid, whereas in the period of interruption through February, 1962 the Court has projected earnings on each month's production. Another reason for excluding March is that based on the production actually achieved the Court cannot consider as reasonable the conclusion that the heavy overtime hours for that month were necessary to maintain production. From the testimony regarding the cut-back in the regular hourly work force to a 3-day week and the plaintiff's interests in preserving its supervisory staff, it appears possible that the supervisors were doing regular production work which could have been assigned to other personnel. In the absence of probative evidence regarding the need for overtime in March the Court cannot find that this is a proper item for recovery herein.

Based on the foregoing considerations the Court finds that plaintiff is entitled to recover the sum of $16,832.86 on the claim for supervisors' overtime.[19]

Defendants have included within their calculations of plaintiff's business interruption loss $3,950 for estimated office moving costs and $6,000 for cost of rearranging tool

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[19] This figure is arrived at by deducting 14 hours per week from the overtime hours scheduled on the Court's appendix for each of the supervisors for the weeks ending March 4, 1962 and applying the hourly overtime rate to the total hours remaining. The 14-hour deduction is reflective of the theory that a 54-hour work week was normal for supervisors and that they are to be compensated therefor from plaintiff's recovery of denied earnings.

crib and other factory areas. Upon the defendants' concession that these moving costs are proper items for recovery they will be allowed to the plaintiff herein.

In summary, the items for which the plaintiff is entitled to a recovery under the policies in suit are as follows:

Denied Earnings	$215,817
Agreed Expediting Expenses	34,099
Protective Covering	1,088
Supervisors' Overtime	16,833
Conceded Moving Expenses	9,950
	$277,787

The plaintiff is claiming right to recover interest from the time of loss upon the judgment to be entered herein as part of its recovery.

Under the controlling law, interest is not recoverable as a matter of right on a claim for unliquidated damages, and is generally not awarded on such claim. 16 *O. Jur.* 2d Damages § 93. This is a question for the discretion of the Court. Having reviewed the separate briefs of counsel submitted on this question, the Court does not believe that this record warrants an award of such interest on any judgment to be entered herein, and plaintiff's claim for pre-judgment interest will be denied.

The plaintiff's right of recovery of "actual loss sustained" is qualified by the limitation that such recovery shall not exceed "the reduction in gross earnings less charges and expenses which do not necessarily continue during the interruption of business." The purpose of this clause was explained by defendants' expert, Mr. Greenberg, who testified:

> If the loss is greater than conditions under total suspension, they are limited to recovery conditions under that suspension.

The effect of this "gross earnings" restriction on the "actual loss sustained" as determined by the Court has not been considered or briefed by the parties.

Another pertinent policy limitation is referred to as the "contribution clause." This is a provision under which the plaintiff's recovery may be effected by the total amount of insurance carried in relation to the risk of loss insured against. While presentations were made based upon projections not adopted herein, the Court believes that this question should also be considered by the parties on the basis of the ruling herein.

The Court therefore directs the parties to submit supplemental briefs, based on the findings herein as to actual loss sustained, supported by such exhibits and affidavits as may be appropriate, on the questions of the "gross earnings" limitation and the "contribution clause." Such briefs will be due within fifteen days of entry of this memorandum and any answer briefs shall be filed within an additional five days thereafter. Entry of a final order herein shall be withheld until these two issues are determined.

Weekly Hours Over Forty Worked By Supervisors - Plaintiff's 46

Week Ended	FB	BB	HC	EJ	MK	RK	RK	JM	WP	FS	MS	HS	HV	JW
Oct. 8	35	38	30	21	29	22	30	29	30	0	56	29	24	40
15	20	18	30	18	33	34	22	19	32	0	50	35	35	30
22	40	21	30	35	29	36	19	44	30	29	50	26	26	24
29	30	34	50	16	49	34	16	15	53	20	42	26	40	27
Nov. 5	25	12	35	12	33	22	15	13	30	11	40	21	26	33
12	25	7	20	20	26	20	7	14	25	18	44	20	28	14
19	23	7	30	11	29	24	8	23	28	15	36	14	26	20
26	21	8	20	12	18	20	5	5	21	12	44	22	20	10
Dec. 3	25	10	32	14	27	18	10	17	25	13	32	9	26	5
10	25½	7	26	15	27	21	10	14	29	14	23	20	26	4
17	30½	8	25	16	27	22	10	15	30	15	20	18	26	16
24	20	0	34	20	33	18	0	28	30	18	20	14	24	24
31	10	8	20	18	18	10	0	11	16	18	0	10	10	2
Jan. 7	15	9	20	15	18	10	10	14	20	15	16	10	24	22
14	28	9	25	12	27	18	10	14	30	12	15	14	26	31
21	40	9	0	12	27	12	15	15	18	10	12	14	26	33
28	27½	9	0	18	18	24	10	14	20	17	20	14	26	8
Feb. 4	31	9	0	16	20	20	13	15	17	18	20	18	26	14
11	15	10	20	20	20	20	10	15	20	18	16	12	26	27
18	18	10	25	18	20	22	10	15	15	20	10	20	26	8
25	15	9	25	16	20	18	10	23	22	20	8	4	26	16
Mar. 4	20	5	20	12	13	16	20	15	16	20	10	10	26	15
11	18	44	12	16	13	16	25	14	14	18	8	8	26	17
18	18	41	12	20	14	16	15	18	18	18	0	24	26	17
25	25	1	20	15	13	18	10	14	13	20	0	3	26	13
31	24½	1	25	16	13	18	10	14	12	20	0	10	20	6

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Misc. No. 416.

(Entered: August 30, 1967.)

Before: Phillips, Peck and Combs, Circuit Judges.

The application by the defendants for leave to take an interlocutory appeal under 28 U.S.C § 1292 (b) is denied. See *Kraus v. Board of County Road Commissioners*, 364 F.2d 919 (6th Cir. 1966).

Entered by order of the Court.

/s/ CARL W. REUSS,
Clerk.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Nos. C-63-313 thru C-63-323, inclusive.

(Entered: July 26, 1967.)

This cause came on to be heard under Rule 42(b) of the Federal Rules of Civil Procedure on a separate trial of the issues raised under the second defense of the original answers and the supplemental answers filed in these actions and plaintiff's reply thereto, as to the validity and effect of the appraisal award of the loss of plaintiff, and

Trial having been had of that issue, briefs submitted thereon by the parties and a memorandum opinion entered by the Court finding that the appraisal award was void and subject to being set aside by the Court,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of plaintiff as to the issues raised under the second defense to the original answers

and supplemental answers of defendants herein, the Court finding that the appraisal award of September 25, 1964 is void and is not a bar to the maintenance of these actions by plaintiff, and

IT IS FURTHER ORDERED that these actions shall remain for trial on all other issues thereof, and

IT IS FURTHER ORDERED that these orders are entered pursuant to 28 U.S.C. § 1292(b), the Court being of the opinion that they involve a controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeals from these orders may materially advance the ultimate termination of this litigation.

BEN C. GREEN,
United States District Judge.

MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Nos. C-63-313 thru C-63-323, inclusive.

(Filed: July 25, 1967.)

GREEN, *J.*:

These actions were brought against the several defendant insurance companies to recover upon insurance policies issued by the said companies insuring the plaintiff against loss by reason of business interruption caused by fire at its premises at 25100 Detroit Road, Westlake, Ohio. Plaintiff alleged that on or about October 3, 1961, while the policies were in full force and effect, there occurred a fire which destroyed part of the premises. By reason of the fire plaintiff alleged that it sustained losses directly

resulting from the interruption of its business, for which recovery under the policies is sought.

As a defense in these actions the defendants alleged that the policies of insurance provided that if the insured and insurers could not agree as to the amount of the loss an appraisal of the claimed loss should be had; that appraisers and an umpire were appointed according to the terms of the policies, and that on September 25, 1964 the umpire and one of the appraisers joined in a written appraisal finding the plaintiff's loss by reason of business interruption to have been $152,177.11, to which was added $30.996 in agreed expediting expenses, making a total of $183,173.11. Defendants contend this amount is the maximum extent of their liability to plaintiff under the terms of the policies of insurance.

In reply to that defense, plaintiff alleged that certain findings in the appraisal were based upon mistakes in fact and mistakes in law, mistakes in mathematics, mistakes in accounting, and generally failed to determine the actual loss sustained or to follow the insurance policy provisions, contending that the appraisal was invalid.

Defendants moved for a separate trial on the issue of the validity of the appraisal award, on the basis that if the appraisal award were to be sustained it would end the litigation. That motion was granted by the Court. A hearing has been had on this issue, briefs have been submitted by the parties, and the question of the conclusiveness of the appraisal is now presented for decision.

Each of the subject policies contained the following provisions, which are pertinent to these actions:

> 1) * * * this policy covers only against loss resulting directly from necessary interruption of business caused by damage to or destruction of real or personal property * * * by the perils insured against * * * on premises occupied by the Insured * * *

2) In the event of such damage or destruction this Company shall be liable for the Actual Loss Sustained by the insured resulting directly from such interruption of business, but not exceeding the reduction in Gross Earnings less charges and expenses which do not necessarily continue during the interruption of business, for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property herein described as has been damaged or destroyed * * *.

APPRAISAL.

In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

There are other provisions in the policies relating to expenses to reduce the loss and the manner of computing gross earnings which were the subject of the trial testimony and which have been considered by the parties in their briefs. This Court, however, does not consider it

necessary to incorporate the text of those provisions in this Memorandum.

The parties have cited many decisions and secondary authorities regarding the question of conclusiveness of an appraisal award. Those decisions speak in terms of "manifest mistake," "misfeasance," "malfeasance," and "fraud" as being grounds for setting aside an appraisal award, as distinguished from "errors of judgment," "mistakes of judgment," and "erroneous conclusion" which are said not to be sufficient to set aside an award. See *Couch on Insurance* (2d) Vol. 14 Sec. 50:246.

> As a general rule, courts will not interfere with the award of appraisers selected by the insurer and insured to appraise a loss under an insurance policy, excepting to prevent a manifest injustice. Every reasonable intendment and presumption will be indulged in to sustain such an award, and it will not be vacated unless it clearly appears that it was made without authority or was the result of fraud, mistake, or misfeasance of the appraisers. 30 O. Jur. 2d Insurance § 734.

An appraisal award is conclusive and binding on parties unless it is shown to be void or voidable. *Royal Insurance Co. v. Ries,* 80 Oh. St. 272 (1909).

Fraud or manifest mistake may make an appraisal void. *Baltimore & Ohio R.R. v. Stankard,* 56 Oh. St. 224 (1897). In a reading of the briefs submitted by plaintiff and defendants, there appears to be a definition of manifest mistake recognized by the parties. That definition, and rule evolving from it, may be restated as follows: If in making the award the umpire and appraisers adopted a particular theory and then did not apply the theory or rules so adopted by them in arriving at their ultimate conclusion, this would be a manifest mistake and the award may be set aside.

In this Court's opinion the critical portions of the appraisal award, which was signed by the umpire and the appraiser appointed by the insurance companies, are as follows:

1) *Period of Interruption*

The umpire finds that the period from October 3, 1961 to May 2, 1962 was a reasonable time in which to rebuild the building and to move and relocate the machinery and equipment which had to be reconstructed and replaced on account of the fire on October 3, 1961, but must also recognize and find that the strike at Brunswick was the principal cause of the decrease of the sales value of production of Lakewood from January 9, 1962 to May 2, 1962, and that this fact must be taken into consideration in the determination of the actual cash value of the loss sustained by Lakewood.

2) *Actual Cash Value of Loss*

In determining the actual cash value of Lakewood's loss I have used the potential production figures submitted by Mr. Preston A. Robertson, a net profit rate of 10% with adjustments for the profit shown on the statement submitted by Mr. Preston A. Robertson as well as for the strike at Brunswick on January 9, 1962, as follows:

Net profit of 10% on $2,849,305.00 is	$289,430.50
Less profit shown on statement submitted by Mr. Robertson	13,246.99
Net profit less above adjustment	276,183.51

Sales value of production as submitted by Mr. Robertson for the period from October 3, 1961 to May 2, 1962 is $2,894,305.00 and this amount adjusted for the period of October 3, 1961 to January 9, 1962 is $1,595,057.00 or 55.1%.

I therefore find that the actual cash value of the loss is 55.1% of $276,183.51 or $152,177.11.

The factual background pertinent to these findings concerns the relationship of the plaintiff to the Brunswick Corp. and the effect that a strike which took place at Brunswick during the period January 9, 1962 through April 6, 1962 had upon the plaintiff's business.

The evidence disclosed that the plaintiff's major customer was the Brunswick Corp., and that in addition to the abovementioned strike in the year 1962 Brunswick suffered a severe decline in business from the levels which it had projected. The evidence further disclosed, however, that Brunswick's orders with its suppliers were placed substantially before anticipated production or delivery dates based on the business projections, and involved a series of release dates as to purchase of raw materials, production and shipping.

The evidence further disclosed that as of January 9, 1962, when the Brunswick strike began, plaintiff had on hand about $1,200,000 in Brunswick orders with release dates therefor, and had approximately $156,000 in orders from other customers. During the period from January 9, 1962 through May 2, 1962 plaintiff received approximately $650,000 in orders from customers other than Brunswick. Plaintiff's actual production during the period January 9, 1962 through May 2, 1962 was approximately $854,307, and of this amount $331,000 was for Brunswick. Actual production for the entire period from October 3, 1961 through May 2, 1962 was approximately $1,843,253. These figures were known by the appraisers and the umpire.

It is immediately apparent that the sales value of production of $1,597,057 upon which the appraisal award is predicated is less than the actual production plaintiff achieved during the period October 3, 1961 through May 2, 1962. The reason for this is found in the following testimony of the umpire:

Q. What did you allow for potential production from January 9th to April 9th?

A. I never computed it.

Q. You allowed zero for that period, did you not, from January 9th to May 2nd?

A. In the award, yes. That was all taken out. I didn't allow anything for that. (Transcript, p. 226)

In attempting to explain his position of finding a period of rebuilding the plant extending through May 2, 1962 and then not allowing any recovery on losses in production or possible reduced profits on actual production after January 9, 1962, the umpire stated that he felt he was giving the plaintiff the benefit of the doubt by allowing the largest projected production figures for the entire period[1] and then prorated that production on a 55.1% basis (Tr. pp. 225-230). He further stated that in so doing he was allowing the plaintiff an excess allowance for the period up to January 9, 1962, to make up for other items for which he made no allowance (Tr. pp. 196-198; 236-237). His basis for not allowing any profit for the period after January 9th was that during the strike plaintiff was able to satisfy the needs of Brunswick (Tr. pp. 212, 231) and that the production of April, 1962, after the strike ended, was greater than in 1961 (Tr. p. 200). The Court notes that in the appraisal report of the defendants' appraiser he had adopted a period of interruption ending with January 9, 1962, after originally recommending a finding of no actual period of business interruption, (Tr. pp. 180, 186), whereas the plaintiff's appraiser had recommended a finding of a period of business interruption extending to May 2, 1962 (Tr. pp. 179, 185). It appears to this Court that the umpire tried to make a compromise which would

[1] The projected production figures upon which these calculations were made were those of the appraiser appointed by plaintiff.

take both of the appraisers' recommended findings into account.

Defendants contend that the umpire's award should be construed as containing two divisible findings under the insurance policies. First, the actual period of business interruption and, second, the length of time to rebuild or repair the fire damage. Defendants cite many authorities to the effect that the latter period imposes a maximum limit upon the right of an insured to recover for interruption of business caused by an insured peril. Defendants argue that the award in fact finds a period of interruption ending on January 9, 1962 although including a finding that the period from October 3, 1961 to May 2, 1962 was a reasonable rebuilding period.

While the Court recognizes the validity of the abstract argument that the length of actual business interruption caused by an insured peril may be shorter, equal to or longer than the maximum period of liability under the insurance contracts, the Court cannot agree with the defendants' construction of the actual award with which we are here concerned.

Under the heading "Period of Interruption" the award states that the period ending May 2, 1962 was a reasonable rebuilding period and then states that the Brunswick strike was "*the principal cause of the decrease of sales value of production* of Lakewood from January 9, 1962 to May 2, 1962, and that this fact *must be taken into consideration* in the determination of the actual cash value of the loss sustained by Lakewood."

The award does not state that after January 9, 1962 the plaintiff's production facilities were no longer disrupted by reason of the fire and no further loss would be sustained. The award does not state that after January 9, 1962 plaintiff was able to operate efficiently and at a

normal profit as the effects of the fire on the plaintiff's operations had terminated. The award does not state that the Brunswick strike ended the period of interruption but rather states that it must be taken into consideration in determining plaintiff's loss.

If the actual loss sustained by plaintiff by reason of interruption of business caused by the fire had ended on January 9, 1962, an express finding of that fact should have been made by the umpire, and no determination of a fixed rebuilding period extending beyond that date would have been necessary. By reason of the fact that the only expressed time period found by the umpire was the reasonable rebuilding period, it is the Court's conclusion that the award must be construed as finding a period of business interruption as a result of the fire extending from October 3, 1961 to May 2, 1962, subject to the fact that the strike at Brunswick had to be considered in determining plaintiff's actual loss sustained.

Other facts of record in this case militate against the conclusion that the umpire intended to terminate the actual period of interruption on January 9, 1962. In determining the sales value of production upon which the recovery was to be based the award started with a projection extending through May 2, 1962. The profit of $13,246.99 which the umpire found the plaintiff achieved during the period of interruption and which was offset against the award was for the period ending May 2, 1962.

In his testimony the umpire stated that he recognized that the fire damage was not fully restored until May 2, 1962 (Tr. pp. 201, 202) and that he was aware that the rebuilding effort would interfere with production (Tr. pp. 233-235). Notwithstanding this knowledge, the umpire made no finding as to whether the effects of the fire resulted in reduced profits on actual production by plaintiff

during the period from January 9 to May 2, 1962. (Tr. p. 236).

Assuming that the umpire's award can be construed as finding that plaintiff did not sustain any loss in sales value of production after January 9, 1962, as he appeared to indicate on cross-examination (Tr. p. 276), that should not have been the terminal point of his findings. Having found that the reasonable rebuilding period extended to May 2, 1962, the umpire had the obligation to determine if the plaintiff achieved a normal profit margin on the actual production of goods made during the period from January 9, 1962 through May 2, 1962. The plaintiff was entitled to a normal profit on its production during that period, and was entitled to a recovery under the insurance policies if its profit margin on actual production was diminished as a consequence of the fire resulting in an actual loss during that period. The umpire in his award gave no consideration to these factors, except to the extent that he stated that he permitted the plaintiff the benefit of the doubt to make up for items for which he made no allowance.

It is this Court's opinion that the award represents a sincere and honest effort by the umpire to mediate the dispute between these parties as presented to him by the appraisers they had selected. In so doing, however, he failed to fulfill the obligation imposed upon him by the insurance contract, i.e., to determine the actual loss sustained by the insured directly from the interruption of business caused by the fire. It was his duty to determine the plaintiff's actual loss during the time he found to be necessary for the restoration of the premises to a normal level of productivity. Instead, he restricted the period for which recovery was allowed to that period in which he believed there was a lost sales value of production, and

ignored the effect of the fire on the plaintiff's production for the remaining period, and to compensate therefor he stated he gave the plaintiff the benefit of the doubt on other matters.

Had the umpire made a firm finding that the period of interruption caused by the fire ended on January 9, 1962 and that there was no actual loss sustained thereafter, that would present a question of judgment which would not be subject to review by this Court. The award, as this Court believes it must properly be construed, having adopted the theory that the disruption of the plaintiff's manufacturing facilities as a result of the fire extended to May 2, 1962 and then having failed to consider that fact in arriving at the ultimate conclusion, is subject to being set aside by this Court.

The umpire found that a reasonable recovery for the plaintiff in the operation of its business should be computed on a 10% net profit basis. Plaintiff's *actual production* during the period beginning October 3, 1961 and ending May 2, 1962 was $1,843,253, on which a 10% rate of profit as found by the umpire would generate earnings of $184,325.00, whereas the profit which the umpire found was achieved by plaintiff during this period, as indicated in the record, was $13,246.99. Therefore, even assuming that plaintiff lost no production over the entire seven-month period, the award represents a figure approximately $32,000 less than that to which plaintiff would have been entitled on actual production achieved from October 1, 1961 to May 2, 1962 on the basis of a 10% profit ratio.

It is this Court's finding that the appraisal award of September 25, 1964 set forth that the rebuilding period of plaintiff's plant extended from October 3, 1961 to May 2, 1962 and then failed to determine the actual loss sustained by plaintiff during this period. The award therefore is not

made in accordance with the terms of the insurance contracts between the parties. The Court believes that this requires that the appraisal award be set aside.

Many other matters have been argued by the parties including overtime pay, allocation of research and development expenses, profit margins, the effect of plaintiff's expanded plant, and others. The Court does not consider it necessary to pass on these matters at this time.

These cases will be ordered set for trial on their merits.

Supreme Court, U.S.
FILED
JUL 28 1970
CLERK

In the Supreme Court of the United States

No. 341.

OCTOBER TERM, 1970.

LAKEWOOD MANUFACTURING COMPANY,

Petitioner,

vs.

THE HOME INSURANCE COMPANY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

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In the Supreme Court of the United States

No. 341.

OCTOBER TERM, 1970.

LAKEWOOD MANUFACTURING COMPANY,

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vs.

THE HOME INSURANCE COMPANY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Ohio pertinent to the petition for writ of certiorari is printed at pp. 68-79 of the Appendix attached to the said petition. The opinion of the Court of Appeals for the Sixth Circuit is reported at 422 F. (2d) 796 (1970).

STATEMENT OF THE CASE.

Petitioner is the insured under some twelve insurance policies which insured it "only against loss resulting directly from necessary interruption of business caused by damage to or destruction of real property, except finished stock, by the peril(s) insured against" (i.e., fire, windstorm, explosion, etc.) "for only such length of time as

would be required with the exercise of due diligence and dispatch to rebuild, repair or replace" the damaged property.

On October 3, 1961, a fire occurred in a limited portion of petitioner's connected buildings in Westlake, Ohio. Despite the fire, petitioner continued to manufacture at a high rate of production until January 9, 1962, when a strike occurred at the plant of its primary customer, The Brunswick Corporation. As a result of the strike, petitioner was unable to ship goods to Brunswick or to receive payments for the goods it would be producing. Accordingly, petitioner drastically curtailed its production, cutting back to a three-day work week (R. 872). When the strike ended, on April 6, 1962, petitioner resumed full production.

Differences thereafter arose between petitioner and its insurers, respondents herein, as to the amount of the business interruption loss suffered by petitioner as a result of the fire, respondents being of the view that most of petitioner's claimed $527,000 business interruption loss (R. 573) was caused by the strike at Brunswick and not by the fire.

In March, 1963, this dispute was submitted to appraisal in accordance with express provisions contained in each of the policies of insurance.[1] On September 25, 1964,

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[1] "In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, fail-

(Continued on following page)

after more than a year of independent investigation, study and analysis, the umpire and one of the two appraisers concluded that, although "the period from October 3, 1961 to May 2, 1962 was a reasonable time in which to rebuild the building and to move and relocate the machinery and equipment which had to be reconstructed and replaced on account of the fire on October 3, 1961," any business interruption loss after January 9, 1962 was due to the strike at Brunswick and not to the fire (A. 72). The umpire and concurring appraiser therefore determined that the actual cash value of the business interruption loss caused by the fire, namely, that loss which occurred in the period from October 3, 1961 to January 9, 1962, was $152,177.11, plus $30,996 in agreed "expediting expenses."

In the meantime, on April 10, 1963, petitioner had filed separate suits on the twelve business interruption insurance policies issued by respondents for the total sum of $850,000. After the appraisal award was rendered, respondents pleaded that that award determined the total amount of petitioners' business interruption loss. Petitioner replied that the award was invalid.[2]

The issues raised by petitioner with respect to the validity of the appraisal award were tried separately by the District Court. At the trial, both the umpire and the concurring appraiser testified *without contradiction* that

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(Continued from preceding page)

ing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally."

[2] The basis of the claim of invalidity was that the award was based on mistakes in fact and mistakes in law, mistakes in mathematics, mistakes in accounting, and that the award in general failed to determine the actual loss sustained by plaintiff.

the amount of their award was based on their determination that petitioner had sustained no actual business interruption loss *as a result of the fire* after January 9, 1962 (R. 288-289, 582, 601). The District Court, however, while conceding that "the award represents a sincere and honest effort by the umpire to mediate the dispute between the parties as presented to him by the appraisers" (A. 77), completely overlooked this testimony and proceeded to *deduce* the umpire's intent solely on the basis of *inferences* drawn from the expository language of the award. Thus, the District Court concluded that:

> "*By reason of the fact that the only expressed time period found by the umpire was the reasonable rebuilding period*, it is the Court's conclusion that the award must be construed as finding a period of business interruption as a result of the fire extending from October 3, 1961 to May 2, 1962, subject to the fact that the strike at Brunswick had to be considered in determining plaintiff's actual loss sustained." (A. 76) (Emphasis added.)

The District Court then proceeded to hold that the umpire and concurring appraiser had "failed to determine" what loss petitioner had sustained during the final four months of the seven-month "period of business interruption" that the Court had "construed," and that the appraisal award was therefore invalid.

On appeal, following a further trial in which the District Court determined that the amount of petitioner's business interruption loss as a result of the fire was $277,787, the Court of Appeals for the Sixth Circuit held that the District Court's construction of the appraisal award was clearly erroneous, and that the District Court therefore erred in setting it aside.

ARGUMENT.

In an effort to persuade this Court to grant a writ of certiorari, petitioner makes the astonishing assertion that the decision of the Court of Appeals for the Sixth Circuit, upholding the validity of the appraisal award, "has developed utter chaos." In fact, the decision of the Court of Appeals is squarely in accord with settled rules of law adhered to by the courts of Ohio, and of virtually every other jurisdiction, for almost a century. Therefore, anything akin to "chaos" would result *only if petitioner were to prevail* in its efforts to upset that decision.

I. THE COURT OF APPEALS APPLIED THE CORRECT RULE OF LAW IN UPHOLDING THE APPRAISAL AWARD.

The Court of Appeals stated the controlling rules of law in appraisal award cases to be as follows:

> "Generally, a court will not interfere with an appraisal award but, to the contrary, will indulge in every reasonable presumption to sustain it in the absence of fraud, mistake, or misfeasance. A court will not substitute its judgment for that of the appraisers or set aside an award for inadequacy or excessiveness unless it is so palpably wrong as to indicate corruption or bias on the part of the appraisers. 44 Am. Jur. 2d *Insurance* § 1719 (1969).
>
> "The law of Ohio, applicable here, is essentially in line with the general rule. In Ohio, fraud or manifest mistake is a proper legal basis upon which to set aside an appraisal award. *Baltimore & Ohio RR v. Stankard,* 56 Ohio St. 224 (1897). To constitute manifest mistake, the mistake must be of such character that the arbitrator or appraiser would have corrected it had it been called to his attention; a mistake of judgment is not manifest mistake. *Pfleger v. Renner,* 13 Ohio App. 96 (1920). See *Bates v. Pennsyl-*

vania RR., 26 Ohio L. Abs. 114 (App. 1937)." (422 F. (2d) at 798.)

The basic thrust of petitioner's argument is that the rule cited by the Court of Appeals, *viz.*, that an award may be set aside only on the grounds of fraud or manifest mistake, applies solely to arbitrations, whereas appraisals may be set aside for mistakes of any kind, including errors in judgments.

This argument is wholly fallacious. It is abundantly clear from the Ohio cases that the rule cited by the Court of Appeals is applicable to *both* appraisal awards and arbitration awards. The Supreme Court of Ohio, in *Baltimore & Ohio Railroad Company v. Stankard*, 56 Ohio St. 224, 232, 46 N.E. 577 (1897), specifically stated that, where a contract provides that

> "the amount of loss sustained * * * shall be determined by a certain person named in the contract, such fact when ascertained and fixed by the person, and in the manner provided by the terms of the contract, is conclusive between the parties, in the absence of fraud or *manifest mistake* * * *." (Emphasis added.)

That the Supreme Court was here speaking about an *appraisal*, as distinguished from an arbitration, is clear not only from the fact that the type of agreement it desoribed fits precisely the accepted definition of an appraisal (namely, "*the resolution of the specific issues of actual cash value and the amount of loss*," [5 AM. JUR. (2d) 520, *Arbitration and Award*, § 3 (1962)]) as distinguished from an arbitration (which "ordinarily encompasses the disposition of the entire controversy between the parties" [*Ibid.*]), but also from the fact that one of the cases cited by the Supreme Court as illustrating the type of contract it was referring to—*Hamilton v. Insurance Co.*, 136 U.S. 242 (1890)—involved an insurance appraisal

provision very similar to that which is at issue in the instant case.[3]

Hence, there can be no question but that the rule of manifest mistake applies to appraisals as well as to arbitrations. Indeed, this conclusion is so self-evident that *petitioner itself*, in the Brief it submitted at the conclusion of the trial on the validity of the appraisal award, specifically represented to the District Court that:

> "The determinative issue, then, is whether Umpire Yoder was *manifestly mistaken* in the findings he detailed in his award." (Plaintiff's Trial Brief, p. 8, filed February 13, 1967.)

In an effort to obtain a writ of certiorari, petitioner now repudiates the very rule which it urged on the District Court.

In support of its novel proposition that appraisals can be set aside for mistakes other than "manifest mistakes" (that is to say, mistakes of such a character that the arbitrator or appraiser would have corrected them had they been called to his attention) plaintiff relies on three propositions: (1) a truncated statement from the second syllabus of *Royal Insurance Company v. Ries*, 80 Ohio St. 272, 88 N.E. 638 (1909), that an insurance appraisal "is not to be judged by the strict rules applicable to arbitration and awards"; (2) the assertion that appraisal awards have "never been considered binding" (Brief of Petitioner, p. 7); and (3) the fact that certain authorities *outside of Ohio*, including 44 AM. JUR. (2d) 631, *Insurance*, § 1719, and *In Re Waters*, 93 F.(2d) 196 (C.A. 5, 1937), do not use the adjective "manifest" when they state that an

---

[3] The appraisal provision in the instant case, of course, itself fits the description set forth in the *Stankard* case, for it provides that if there is a disagreement "as to the actual cash value or the amount of loss," then the parties may appoint appraisers who "shall determine the amount of actual cash value and loss."

appraisal award may be vacated for "fraud or mistake or misfeasance of the appraisers."

When, however, these propositions are analyzed, it quickly becomes evident that (1) and (3) have been completely misconstrued by petitioner while (2) is absolutely untrue.

Thus, by quoting only a tiny portion of the *Ries* case syllabus, petitioner totally distorts the meaning of the Ohio Supreme Court's reference to "the strict rules of arbitration and award." The *entire* second syllabus in that case reads as follows:

> "2. The provision in a standard fire insurance policy that 'In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally all expenses of the appraiser and umpire,' is a provision for an appraisement and not for an arbitration, and such submission is not to be judged by the strict rules applicable to arbitration and award, and *where the appraisers and umpire have before them a list of the property destroyed, and the insured's statement in detail in respect to his loss, it is not ground for setting aside the appraisement that they refuse to hear evidence.*" (Emphasis added.)

The omission from petitioner's Brief of the italicized language is a most significant one. These latter words, to-

gether with the full text of the Supreme Court's opinion, clearly demonstrate that the "strict rules" that the Supreme Court was referring to were the rules of "*strict judicial investigation*" applicable to arbitrations (80 Ohio St. at 285), such as the requirements for holding formal hearings and adjudging the matters to be decided solely on the basis of evidence presented during adversary proceedings (5 AM. JUR. (2) 521, *Arbitration and Award*, § 3), and that the Supreme Court was in no way intimating that an appraisal award may be *set aside more readily* than might an arbitration award. To the contrary, the very holding of the *Ries* case was that an insurance appraisal award could not be voided on account of the refusal of the appraiser and umpire to "hear evidence," a failure that *would* suffice to void an *arbitration* award.

Nor do any courts outside of Ohio support petitioner's suggestion that appraisal awards may be set aside for different or less restrictive grounds than are required to set aside arbitration awards. As was held by the Maryland Court of Appeals in *Schreiber v. Pacific Coast Fire Insurance Co.*, 195 Md. 639, 75 A.2d 108, 20 A.L.R. (2d) 951 (1950), the

> "rule restricting and preventing judicial review of errors of fact or of law in an award of arbitrators is applicable to an appraisal under the usual appraisal clause in a fire policy."

Petitioner's astonishing assertion that insurance appraisals have "never been considered binding" is also completely devoid of any supporting authority. The standard policy specifically provides that the appraisal award "shall *determine* the amount of actual cash value and loss" (emphasis added) and the verb "determine" means "to bring to an end" (*Mullen v. Mullen*, 11 Ohio

N.P. (N.S.) 353, 358, 21 Ohio Dec. 356 (1911)), "to settle a question or controversy" (*State of California v. United States*, 119 F. Supp. 174, 177 (Ct. Cl., 1954)). Accordingly, the authorities have universally held that if an insurance policy

> "provides that in case of a disagreement as to the amount of loss the matter shall be submitted to appraisers, whose 'award shall *determine* the amount of such loss,' and an appraisal is had in conformity with such provisions, the insurer and the insured will both be *bound* by the result."
>
> 14 COUCH ON INSURANCE (2d) 469, § 50:228 (1965) (Emphasis added.)

The Ohio cases enunciating this rule include *Royal Insurance Company v. Ries*, 80 Ohio St. 272, 88 N.E. 638 (1909), holding that where an appraisal is had pursuant to the policy provisions, the amount the insured may recover is limited to the "amount of the loss so determined, and he cannot recover a larger amount unless the appraisement is void or is set aside"; *Fire Association of Philadelphia v. Agresta*, 115 Ohio St. 426, 430, 154 N.E. 723 (1926), stating that an insurance company could utilize the appraisal proceeding provided for in the policy in order to have the loss determined instead of having it determined by a jury or a court; and *Erie Brewing Company v. Ohio Farmers Insurance Company*, 81 Ohio St. 1, 89 N.E. 1065 (1909), holding that a mortgagee of the insured premises which is named in the loss payable clause of the policy is

> "bound by the award of appraisers provided for and required by the terms of the policy in the event of a disagreement between the insured and the insurance company as to the amount of the loss, although the

mortgagee was not a party to and had no notice of the appraisement and award".

The intermediate Court of Appeals decision relied upon by petitioner—*Rademaker v. Atlas Assurance Co., Ltd.*, 98 Ohio App. 15, 120 N.E. (2d) 592 (1954)—in no way contradicts these holdings. That case involved an application filed with a Common Pleas Court, without summons or pleadings, asking the Court to "confirm" an appraisal award and to enter final judgment in the amount thereof. In holding that there was no statutory or common law authority for such a summary proceeding, the Court of Appeals commented that it was not even able to determine the effect of the appraisal award on the parties because the policies of insurance "were not put into evidence" and the record therefore did not disclose "just what the terms of the policies of insurance are with respect" to the appraisal agreement that was entered into by the parties after the loss.

In the instant case, the policy provisions *were* put into evidence, and, as has been discussed above, they conclusively demonstrate that appraisal awards rendered thereunder are binding on the parties.

As for the statement in 44 AM. JUR. (2d) 631, *Insurance*, § 1719, that an appraisal award "will not be vacated unless it clearly appears that it was made without authority or was the result of fraud, mistake, or misfeasance of the appraisers," [4] it is evident that the word "mistake" is being used here in *precisely the same sense* as the Ohio courts use "manifest mistake"—namely, a failure of

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[4] At page 5 of its Brief, petitioner attributes this quotation to 30 OHIO JUR. (2d) 674, *Insurance*, § 734, thereby suggesting that it is a statement of Ohio case law. In fact, the authors of OHIO JUR. (2d) took this statement directly from 29 AM. JUR. 934, *Insurance*, § 1251, and not from any Ohio case.

the award to speak the intention of the appraisers—and not in the sense of "any error," as claimed by petitioner. Thus, one of the cases that the authors of AM. JUR. (2d) cite in support of this statement is *Patriotic Order Sons of America Hall Association v. Hartford Fire Insurance Co.*, 305 Pa. 107, 157 A. 259, 78 A.L.R. 899 (1931), wherein the Supreme Court of Pennsylvania held that:

> "An award of arbitrators or appraisers, such as is provided for in the policy in this case and in the agreement of submission, cannot be set aside except for actual fraud or deception, or *for a mistake on the part of the appraisers which is not a mere mistake of judgment*.
>
> * * * * *
>
> "The mistakes which will avoid an award are in a very limited class. 'An honest mistake of judgment in the conclusion of arbitrators which does not exceed the bounds of the submission is not, as a general rule, ground of impeachment of the award, whether the alleged mistake is one of fact or of law, or of both. * * * Such errors are among the contingencies which parties assume when they select such tribunals. When it is sought to set aside an award, upon the ground of a mistake committed by arbitrators, it is not sufficient to show that they came to a conclusion of fact erroneously, however clearly it may be demonstrated that the inference drawn by them was wrong. It must be shown that, by some error, they were so misled or deceived that they did not apply the rules which they intended to apply to the decision of the case, so that upon their own theory, a mistake was made which has caused the result to be somewhat different from that which they had reached by their reason and judgment. A contrary course, it is said, would be a substitution of the judgment of a court in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.' 5 C.J. 179." (Emphasis added.)

It should be noted that the first sentence of the above quotation, as well as the paragraph taken from 5 C.J. 179, was quoted with approval and followed by the Ohio Court of Appeals in *Bates v. Pennsylvania Rd. Co.*, 26 Ohio L. Abs. 114, 119, 33 N.E. (2d) 678 (App. 1937).

The leading treatises on insurance law enunciate this same principle of law. Thus, 14 COUCH ON INSURANCE (2d) 481, § 50: 252 (1965) states that

> "the only ground upon which the court is warranted in setting aside an award arrived at deliberately and apparently in good faith, on account of mistake, is the failure of the award to speak the intention of the appraisers."

Accord: 45 C.J.S. 1370-1371, *Insurance*, § 1127 (1946), stating that in order to set aside an appraisal award for "mistake" the

> "mistake must be palpable or gross and such that the award does not speak the intention of the appraisers or arbitrators. A mere mistake of judgment or an honest error in applying the rules of evidence does not constitute a valid reason for setting aside an award."

As for the non-Ohio cases which mention "misfeasance" as a ground for setting aside appraisal or arbitration awards, it is readily apparent that those courts are talking about *misconduct* of the appraisers, or their failure to perform the duties committed to them; they are not talking about inadequate, or "unjust" awards, as petitioner seems to believe. As was held by the Court of Appeals for the Eighth Circuit in *Phoenix Insurance Co. v. Everfresh Food Co.*, 294 F. 51 (C.A. 8, 1923):

> "We are not concerned with the question as to whether the appraisal is more or less than we now think it should have been, or whether it approximates,

> in our judgment, an amount that would have been allowed on a regular trial in court; we are only concerned with whether it was fairly and honestly made, and *expresses the unprejudiced and unbiased opinion and judgment of the appraisers.* When so made a court is without right to set it aside. The record convinces us that there *was no misconduct or misfeasance on the part of the appraisers,* and that the procedure adopted and the appraisement they made violated no right of the appellee." (Emphasis added.)

There was no evidence of "misfeasance" in the instant case. To the contrary, the District Court specifically found that

> "the award represents a sincere and honest effort by the umpire to mediate the dispute between these parties as presented to him by the appraisers." (A. 77.)

II. THE APPRAISAL AWARD DID NOT ALTER THE POLICY COVERAGE.

The contention advanced in the second section of petitioner's Brief is that the appraisal award "altered the express language of coverage of fire insurance contracts." According to petitioner, it was improper for the Court of Appeals to uphold an award that found that the period of actual loss sustained due to business interruption was shorter than the length of time required to rebuild and repair the damaged property.

However, every federal Court of Appeals that has been confronted with this situation has held that such a distinction is proper and in accordance with the policy provisions. Thus, in *Rogers v. American Insurance Co.*, 338 F.(2d) 240 (C.A. 8, 1964), the Court of Appeals held that the "length of time required to rebuild" provision simply imposes a " 'cut-off' date" beyond which

recovery is not permitted. (In other words, any business interruption loss continuing after that date is not recoverable under the policy.) See, also, *Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co.*, 360 F.(2d) 531 (C.A. 8, 1966), wherein the Court found that the length of time to rebuild was 33 days, but went on to hold that the insured had suffered *no business interruption loss.* Even the District Court in the instant case *conceded* that "the length of actual business interruption caused by an insured peril may be shorter, equal to or larger than the maximum period of liability under the insurance contracts," i.e. "the length of time to rebuild or repair the fire damage" (A. 75). Accordingly, the umpire and concurring appraiser had every right to find, as they did (R. 288-290, 582, 601), that the business interruption loss resulting from the fire ended on January 9, 1962, even though the repairs were not completed until May 2, 1962.

The failure of petitioner to grasp this distinction explains a number of the "errors" it attributes to the appraisal award, such as petitioner's assertion that while it "*actually* produced $1,843,000 during the period of interruption, the appraisal award only allowed a potential production of $1,595,057" (Petition, p. 11; emphasis by petitioner). Petitioner here is comparing apples to oranges, for the $1,843,000 "actual production" figure it cites was Lakewood's actual production for the full *seven-month period* of repairs (October 3, 1961 to May 2, 1962), whereas the $1,595,057 "allowed potential production" figure covers only the *three-month period* of business interruption loss due to the fire.

As for petitioner's attack on the umpire's finding that petitioner would have realized a 10% profit on the product it lost as a result of the fire, petitioner overlooks the

fact that this finding was a *matter of judgment* which cannot be overturned by the Courts. 45 C.J.S. 1370, *Insurance*, § 1127; *Pfleger v. Renner*, 13 Ohio App. 96 (1920). As was held in *Igor Bros. v. National Ben Franklin Fire Insurance Co.*, 110 N. J. Eq. 373, 160 A. 382 (1932):

> "*It was a matter of judgment* whether the fair measure of the profits which the insured lost because of the fire was to be found in the two-year table or in the five-year table or in some other tabulations. *On such matters of judgment the award is conclusive.*" (Emphasis added.)

III. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE DECISION OF THE DISTRICT COURT WAS CLEARLY ERRONEOUS.

As noted earlier in this Brief, the District Court based its decision setting aside the appraisal award on its "conclusion that the award must be construed as finding a period of business interruption as a result of the fire extending from October 3, 1961 to May 2, 1962" (A. 76). This "conclusion," in turn, was grounded solely on "the fact that the only expressed time period found by the umpire was the reasonable rebuilding period," i.e., October 3, 1961 to May 2, 1962 (A. 76).

The Court of Appeals, upon consideration of the entire record, found the District Court's "construction" of the appraisal award to be clearly erroneous, in that it totally ignored the uncontroverted testimony, at the trial, of Umpire Yoder and appraiser Butler that, although they considered the reasonable rebuilding period to be from October 3, 1961, to May 2, 1962, they had concluded that the actual period of business interruption due to the fire was at an end by January 9, 1962 (R. 288-289 and 582, quoted at 422 F. (2d) at 799). The Court of Appeals there-

fore held that the District Court had ignored the rule, laid down in *Aetna Casualty & Surety Co. v. American Surety Co.*, 64 F.(2d) 577 (C.A. 4, 1933), that ambiguities in appraisal awards should be "resolved in light of the testimony of the umpire and appraiser who signed it" (422 F. (2d) at 799).

In the third section of its petition, petitioner attacks this holding on the ground that the Court of Appeals thereby "invaded the province of the trial court and substituted its interpretation of the evidence for that of the trial judge." (Petition, p. 12)

This assertion is totally baseless. Rule 52(a) Fed. R. Civ. P., specifically provides that the findings of a District Court may be set aside if "clearly erroneous," and this Court, in turn, has held that:

> "A finding is 'clearly erroneous' when *although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 369, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948). (Emphasis added.)

In addition to failing to take cognizance of this controlling rule of law, petitioner's argument also demonstrates a total misunderstanding of the Court of Appeals' decision, as witnessed by its assertion that the Court of Appeals "decided" that "the petitioner's facilities were rehabilitated by the end of December" (Petition, pp. 13-14). The *Court of Appeals* made no such determination. It simply stated that the evidence was overwhelming that *the umpire and appraiser* had determined that "the fire did not impede production after January 9, 1962" (422 F.2d at 800), and that their finding that Lakewood sustained no actual loss due to the fire after that date, which

finding "is implicit in the written award and explicit in their testimony, represents a question of judgment which may not lightly be set aside." (422 F.2d at 799.)

CONCLUSION.

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

No. 341.

OCTOBER TERM, 1970.

LAKEWOOD MANUFACTURING COMPANY,

Petitioner,

vs.

THE HOME INSURANCE COMPANY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

Petitioner respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 12, 1970, and (2) granting the petition, because of substantial grounds not previously presented:

I. The Court of Appeals reversed the trial court on the basis of testimony that was wholly impeached in the trial court;

II. The appraisal team used the Brunswick strike as the sole reason for disallowing petitioner's losses after the strike began, rather than evaluating its effect as an intervening factor occurring during the fire disability period. As a result, petitioner's losses from January 9 thru May 2, 1962 were disallowed, including petitioner's losses for the portion of the fire disability period which extended 25 days beyond the end of the Brunswick strike (April 6 thru May 2, 1962);

III. The appraisal team's period of loss investigation was less than the period of disability, thus denying the insured its full recovery;

IV. Decisions of this Court concerning reversal of a trial court's decision between two permissible views of the weight of the evidence are applicable to this case;

V. The decision in this case has a direct bearing on presently outstanding casualty insurance policies totalling approximately thirty-six trillion dollars;

VI. For all practical purposes, the period of disability and the period of business interruption loss must be equal to provide the contract coverage provided under business interruption policies.

I. THE COURT OF APPEALS REVERSED THE TRIAL COURT ON THE BASIS OF TESTIMONY, THAT WAS WHOLLY IMPEACHED IN THE TRIAL COURT.

The Court of Appeals stated in its Opinion of February 6, 1970 (App. 23-24):*

> "Moreover, Butler (respondents' appraiser), testified that interviews with employees of Lakewood revealed that production operations were practically normal by December, 1961."

There is nothing in the record anywhere to substantiate such alleged interviews by Butler.

Perhaps the Court of Appeals had in mind the testimony of Samuel Laderman, an accountant selected by Umpire Yoder. Laderman testified (Tr. 1st 415)** on

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* "App." references are to the Appendix to the Petition for Writ of Certiorari.

** "Tr. 1st" references are to the transcript of the first portion of the trial, commencing December 7, 1966. "Tr." references are to the second portion commencing January 15, 1968.

direct examination by respondents' counsel that "all of them" (petitioner's employees) had said that by Thanksgiving of 1961 petitioner's production equipment and facilities were running in a normal condition.

This testimony was impeached on cross-examination when Laderman, reading his own handwritten notes, testified (Tr. 1st 487) that petitioner's general foremen told him that operations were only 50% efficient as of May 2, 1962. Laderman also had sworn affidavits of petitioner's employees confirming the fact that conditions were not normal until May 2, 1962 (Tr. 1st 465-66).

By singling out the impeached testimony of Laderman, if indeed that is what they had in mind, the Court of Appeals ignored good, corroborated evidence that petitioner's fire damage was not fully restored and that operations were not normal until May 2, 1962 or later. Such evidence was provided by Umpire Yoder (Tr. 1st 201, 202), respondents' appraiser Butler (Tr. 1st 582, 596-97), petitioner's Sales Manager and Secretary (Tr. 252-53), petitioner's machine shop superintendent, (Tr. 538), master mechanic (Tr. 250) and tool crib foreman (Tr. 737-8), and petitioner's building contractor (Tr. 40).

In its Opinion, the Court of Appeals also made reference to the extent of damage to petitioner's manufacturing facilities, stating (App. 19) that:

"Little damage was done to the actual production area * * *"

This reference no doubt contributed to the Court of Appeals' conclusion that petitioner's losses did not extend beyond January 9, 1962. This illustrates a misapprehension of business interruption insurance, the evidence and the applicable law.

Assume a manufacturing plant has 50 production machines in a production line, and only *one* is damaged or

destroyed. If the destroyed machine were first in the line, and the work on it could not be done by any other machine, there would be a total shut down of production with only a 2% damage or destruction to production machinery. See Withers, *Business Interruption Coverage and Adjustment*, pp. 81-82.

This is analogous to petitioner's case in which unrefuted testimony proved that 50% of petitioner's work space around the machines and in the aisles was robbed from production by necessary placement of destroyed departments into 7400 square feet of undamaged portion of petitioner's plant.

Petitioner's manufacturing space was effectively reduced about 50 per cent as a result of the fire (Tr. 855-59). Before the fire petitioner had 13,463 square feet of aisles and work space around machinery. After the fire, other departments temporarily were located into the production area, thus reducing aisle and work space to 5,563 square feet (Tr. 859). This evidence never was refuted.

The Court of Appeals' reference to "little damage" implies that it completely overlooked the significance of Petitioner's office, tool and die room, tool crib, paint shop, bearing assembly and experimental rooms being crowded into the production area.

This violates the insurance contracts, which protect the *whole* business, not separate units or departments. In *Studley Box & Lumber Co. v. National Fire Ins. Co.*, 85 N.H. 96, 154 A. 337 (1931) the court allowed recovery for partial suspension of business resulting from the burning of a nearby barn used in the manufacturing process.

All of Lakewood's space was production area and was used as such, even though none of it was a barn structure such as in the *Studley Box* case.

It appears that the appraisal team and the Court of Appeals decided that whatever damage was done to the production area did not contribute to losses sustained by Lakewood after January 9, 1962, but did result in losses of $183,000 (the appraisal team award) before that date. After January 9, 1962 the appraisal team blamed the Brunswick strike, as if the Brunswick strike eliminated all of the damages that their award acknowledged existed up to that time, a completely irreconcilable and erroneous conclusion, in direct conflict with the testimony and the facts.

II. THE APPRAISAL TEAM USED THE BRUNSWICK STRIKE AS THE SOLE REASON FOR DISALLOWING PETITIONER'S LOSSES AFTER THE STRIKE BEGAN, RATHER THAN EVALUATING ITS EFFECT AS AN INTERVENING FACTOR OCCURRING DURING THE FIRE DISABILITY PERIOD. AS A RESULT, PETITIONER'S LOSSES FROM JANUARY 9 THRU MAY 2, 1962 WERE DISALLOWED, INCLUDING PETITIONER'S LOSSES FOR THE PORTION OF THE FIRE DISABILITY PERIOD WHICH EXTENDED 25 DAYS BEYOND THE END OF THE BRUNSWICK STRIKE (APRIL 6 THRU MAY 2, 1962).

The appraisal award, after determining a seven month period of disability to petitioner's facilities, stated that "the strike at Brunswick was the principal cause of the decrease of the sales value of production of Lakewood from January 9, 1962, and that this fact must be taken into consideration in the determination of the actual cash value of the loss sustained by Lakewood."

The District Court also gave due consideration to the strike but on a rational basis.

The appraisal did not use the intervening factor of the strike as a *principal* reason for the decrease, it used

the strike as the *only* reason for denying petitioner all potential earnings after January 9th.

Although both the appraisal duo and the District Court gave consideration to the effect of the strike, there was nearly a $100,000 difference between their final determinations.

The reason is quite obvious. The District Court exercised sound judgment as to the effect of the strike, while the appraisal duo used a theory called illogical blundering.

First, the disability of facilities existed for the period from October 3rd to May 2nd. The strike lasted from January 9th to April 6th.

Second, using the Brunswick strike as a principal reason for allowing Lakewood no potential production and no earnings for the duration of the disability period, is to deliberately ignore the fact that Lakewood *had orders on their books from customers other than Brunswick who were* **not** *on strike* (Tr. 1st 299). Further, the umpire allowed no potential production and no earnings for new orders which Lakewood would have acquired had there been no fire (Tr. 892, 893).

If the strike was the principal reason for denying Lakewood potential earnings on potential production, then when the strike ended, the strike was no longer *valid* as a reason for denying Lakewood earnings from production. The Brunswick strike ended on April 8, 1962 (Tr. 1st 150), 25 days before the period of disability ended on May 2, 1962.

Despite the fact, the appraisal refused to recognize actual or probable production or earnings for the period from April 8th to the end of the disability period, May 2nd.

This denial of production and earnings and payroll expenses flies in the face of actual fact that during the period from Jan. 9th to May 2nd, petitioner: (1) Produced $759,000 of goods for all its customers (Tr. 1st 226-27); (2) Produced $331,000 of goods for Brunswick (App. 73); (3) Continued to maintain a work force during the entire period; (4) Continued to rebuild the plant, and relocated departments and replaced plant and office equipment which was damaged; (5) Had $600,000 in producible orders on its books from customers *other than Brunswick* (Tr. 1st 299); (6) Had $1,200,000 of Brunswick orders on its books which it could have produced, but for the fire (Tr. 1st. 150; 162).

The total incompetence of the umpire is demonstrated by the statement, "I didn't try to figure the potential production (after January 9)" (Tr. 1st 299) although admitting inefficiencies existed during February, March and April, 1964 (Tr. 1st 233, 234).

The insurance appraiser also admitted inefficiencies and potential production existed beyond January 9 (Tr. 1st 596-600).

The umpire's accountant admitted that petitioner's employees stated the plant was only 50% efficient until May, 1962 (Tr. 1st 487).

Everyone agrees that fire disability existed during the entire period but only part of the period was computed. Any reduction in the use of business property by the fire causing disruption, disability or dislocation of business operations must be investigated so actual loss sustained can be properly determined.

In this respect the appraisal is a total failure.

When the appraisal was put to the test of a trial, of course, those who created the monstrosity attempted to justify their position by any means at hand.

One method was to use the strike as a complete smothering of the fire effects. Certainly at the very most the strike can only be a happening, not related to the fire, that came into being during the period that the business property was disabled. The strike can have no bearing on the *period* of liability (interruption). It could only be considered, as the District Court did, on how it affected the *amount* of liability (damages).

The appraisal is designed to measure what the insured's earnings would have been if there had been no destruction or damage to the insured's property for that period of time it takes to restore such damaged business property to a point where the insured has the same use of that property as it had prior to the catastrophe.

The Court of Appeals in their decision said (App. 23):

> "The umpire and appraiser *based their* determination *largely* on the fact that in the three months immediately after the fire Lakewood produced at a rate well in excess of $300,000. sales value, whereas the sales value of production dropped significantly during the three months of the Brunswick strike, reaching a low of $72,000 in March, 1962; then, in April, the month the strike ended, sales value of production increased to more than $350,000." (Emphasis added.)

Petitioner's insurance policy states:

> "In determining Gross Earnings due consideration shall be given to the experience of the business before the date of damage or destruction and the *probable* experience thereafter had no (fire) loss occurred."

The appraisal failed to follow this basic premise. Beyond January 9th, the appraisal only considered the *actual experience of a disabled plant* but never considered the *probable experience of that plant if no fire had occurred. The protection afforded by the policy is the*

difference between actual experience and probable experience.

Without that requirement no protection exists, no business interruption policy has any meaning.

The District Court followed this principle that petitioner had the right under the policy to have a determination of its *probable* result versus its *actual* result.

Hawkinson Tread Tire Service Co. v. Indiana Lumbermen's Mutual Ins. Co., 362 Mo. 823, 245 S.W.2d 24 (1951), for example, showed that the court based the loss on the time it would have taken to rebuild the destroyed plant rather than on the shorter time it took actually to resume operations at a new location. Here the court followed the concept of the contract that the loss must be computed on what the insured would *probably* do, not on what it *actually* did.

In the *General Ins. Co. v. Pathfinder Petroleum Co.*, 145 F.2d 368 (9th Cir., 1944), cert. denied 324 U.S. 844 (1944), the court reversed a judgment for the insurer on the ground the insured was entitled to recover earnings from a plant which was contemplated to be built but was not built. The court in this case rejected what *actually* was done and substituted what *probably* would have been done had no fire occurred. This again is within the terms of the insurance contract.

Anchor Toy Corp. v. American Eagle Fire Ins. Co., 155 N.Y.S.2d 600 (Sup. Ct., 1956) held that where the insured abandoned plans to replace its damaged plant by purchasing another, and did not rebuild the destroyed plant, the period of time for liability for loss was the period of time which would have been required to replace the destroyed plant and not even an exact duplicate. No plant was ever built or purchased but the disability period

was set at 48 weeks which the Court decided was the time required with due diligence and dispatch to rebuild or replace the plant. Here again is confirmation that a loss determination must be based on what the insured *would probably* do had no fire occurred rather than what he *actually* did in face of a fire.

This is in line with the general principle.

The umpire and insurance appraiser had ample evidence as to the probable experience of petitioner during the Brunswick strike by viewing what other suppliers of Brunswick actually did during the strike period.

Otis Elevator Co. and Alcoa, both of which had Brunswick orders, continued to produce Brunswick parts during the full period of the strike (Tr. 888; Tr. 1045-47). Also a vice-president of Brunswick testified that petitioner had a right to produce during the strike at protected prices (Tr. 1st 150).

Looking at the actual experience of similar businesses not disabled for a projection of probable experience of the insured was established in *Hutchings v. Caledonian Ins. Co.*, 52 F.2d 744 (D., S. Car., 1931).

Unrefuted testimony of successful businessmen as to what they would have done under similar circumstances also was available.

Mr. Bernard Raimer, a manufacturing businessman, testified specifically (Tr. 1203, 1204) as follows:

> "Q. About the question I asked you. Well, let me break it up into two parts. First, ignoring the effects of the fire just take the hypothetical facts I gave you. You have a major customer who takes most of your goods. That customer goes on strike. You still have production orders sufficient to run for two or three months.
>
> The customer does not cut back the production orders. You have adequate capital available so you

can run, run at a reasonable profit and stockpile.

Now, under those circumstances, do you have an opinion as to whether a reasonable prudent businessman would or would not run production?

A. Absolutely—

Q. No. First, do you have an opinion?

A. Yes, sir.

Q. All right. Now, what is your opinion?

A. Well, under those circumstances any businessman that has that work on his schedule, in order for the simple fact of survival, *he has to run.*

Q. All right. Now, assume the facts as to the fire, and assume this businessman finds that when he does run he is running at a loss and he doesn't have to run to meet a shipping schedule.

Do you have an opinion under those circumstances?

A. You say he does *not have* to run to meet a shipping schedule?

Q. That's right.

A. On that basis, I believe any businessman would attempt to *cut back as much* as he can to minimize his losses.

Q. And how does a businessman do that?

A. To cut back?

Q. Yes.

A. Well, obviously, he would attempt to reduce his force by layoff, still keeping in mind that he would have to run to some degree to maintain his experienced help, which is expensive to train, especially in the precision line that we work in." (Emphasis added.)

Mr. Earl Danielson, a businessman, when asked a hypothetical question as to what he would have done had he been in Lakewood's position with the Brunswick strike, *but no fire*, answered as follows (Tr. 1100, 1101):

"A. My opinion would be any prudent manufacturer would, if he had bona fide purchase orders

from a reputable company, would manufacture during the strike of this company.

Q. And what are the reasons for that opinion?

A. Well, for one thing, it takes some time to work up to the point where you have an order on the books, and as long as they are bona fide orders and you know that eventually you are going to get your money, why, we would go ahead and produce. And I think anybody would do this on the same basis, unless they had received a letter to the contrary that 'You do not abide by this schedule.' "

Now, when asked a second hypothetical question which covered what a prudent businessman, in his opinion, would have done had he been in Lakewood's position faced with the Brunswick strike but *disabled by a fire* and finds he is losing money (Tr. 1109), he answers:

"A. If I were under the same circumstances of having a strike and *having a fire*, and I was losing money, and I had a schedule to meet, I would cut my work force down, and in order to do this, to keep from losing key people, I would cut their hours down until I could recoup my losses, and this is the way I would operate my plant.

Q. Well, if you weren't afraid of losing key people, does that mean you would close completely if you were losing money?

A. Yes, I would.

Q. I take it then you would operate on a partial basis, as a reasonable man, to keep your key people.

A. 'Yes.' " (Emphasis added.)

Another implication is made by respondents and the Court of Appeals by the following

"Despite the fire, petitioner continued to manufacture at a high rate of production until January 9, 1962, when a strike occurred at the plant of its primary customer, the Brunswick Corporation." (Brief of Respondents in Opposition, p. 2.)

The above items develop implications that Lakewood was not entitled to consideration of its loss during a portion of the strike period because:

1. There was no loss of sales;

2. Lakewood should have produced during the strike period.

The respondents' statement is not true nor is it supported by testimony. As an example, plaintiff's Exhibit 47-B and defendants' Exhibit GGGGG, show that production for the four months immediately following the fire was 35% *less* than the average production for the four months *before* the fire. The District Court after consideration of all the facts stated in its opinion (App. 34-35):

> "This defense represents what has been characterized during the course of this trial as the 'recapture theory.' This subject is considered by K. W. Withers in his book 'Business Interruption Insurance, Coverage and Adjustment' at pages 114-115 and 134 and by Henry C. Klein in 'Business Interruption Insurance' at pages 100-101. These authors appear to agree that in the case of a manufacturer who sells his goods shortly following their production, actual loss from business interruption is measurable on denied sales value of production. On the other hand a manufacturer with an excess production capacity and no ready market for his goods may only suffer a deferment of income rather than an actual loss thereof as a consequence of an interruption of his business.
>
> "Taking into account the considerations agreed upon by these authors, this Court has concluded that plaintiff suffered an actual loss of sales value of production during the period of interruption, rather than a deferral of realization thereon. The plaintiff's production was geared to an immediate ability to sell. The products were manufactured for, and on the order of, specific customers. This was not a case of manu-

facturer producing a general product on the assumption that it could thereafter be sold on the open market."

Even the umpire and insurance company appraiser agreed that petitioner had no obligation to produce during the fire and strike period at a loss. Mr. Butler testified (Tr. 1st 609-613):

"Q. Now, going generally to business interruption loss now, if a manufacturer has a fire which destroys part of his facility he is entitled, is he not, to just shut down the plant completely until he gets it rebuilt the way he wants it, or indeed he can just go out of business?

A. That is true. That is a decision the operator must make.

* * * * *

Q. Well, if he finds that in actual operating he must operate at a cash loss from day to day or week to week he is not required to do that?

A. No, sir.

* * * * *

Q. Now, if in trying to satisfy a customer he operates at a loss that would be even greater if he would shut down the plant completely. The insurance company doesn't pay for the loss beyond the loss equal to what would happen in reality?

A. That is right.

* * * * *

Q. So he has the option of operating, but he doesn't have to operate at a cash loss and, on the other hand, he may operate at a cash loss if he elects to, but here he has to keep his losses within certain limits?

A. Yes.

Q. The limit is this gross earnings limit?

A. *This is a decision for management.*

Q. And Peplin did, in fact, operate to meet Brunswick's shipping schedule, didn't it, that is, most of the shipments in October and November to Brunswick?

A. This is my understanding.

* * * * *

Q. And your own accountant's analysis of profit and loss showed that although he did make some profit on his operations for October and November, he did run into actual loss in December, didn't he?

A. *That is correct.*

* * * * *

Q. And a further loss in January?

A. *That is correct.*

Q. Again, under the same situation, even deducting expenses that were thought to be abnormal or unreasonable, you wind up with an operating loss in January, do you not?

A. That is what the figures showed.

Q. So by the end of January, Peplin did not have to run to ship to Brunswick because Brunswick was on strike; he then had the option, did he not, whether he should continue to run at a loss or cut back on production?

A. He always had that option." (Emphasis added.)

Mr. Yoder testified (Tr. 1st, 218):

"Q. Well, Mr. Yoder, did you make any inquiry of Brunswick people as to the right of Lakewood to continue to produce under Brunswick's orders?

A. I don't think there had been any question—to answer your question, I didn't go and call on Brunswick myself, no, sir. *But I wouldn't question the right to produce for Brunswick during this period.*" (Emphasis added.)

Further is the direct examination of Mr. Yoder on Tr. 1st 213, 214:

"Q. You did have information, did you not, in fact, evidence from profit and loss statements back at that time, that Lakewood's books at the time, at least, were showing an operating loss on production?

A. We were told that.

Q. You accepted that, did you not?

A. We accepted everything.

Q. What is your interpretation of the requirements of the policy, Mr. Yoder; is a manufacturer required to operate at a loss in order to reduce loss?

* * * * *

A. I don't believe they are required to, no."

Stephen C. Peplin, Petitioner's President, testified that the primary reason Petitioner cut back operations was the fire-disabled plant:

"Q. How does the fact that the insurance companies refuse to agree to pay the $2,500 a month maximum, the failure to pay the interest—affect the conditions other than lack of working capital which you claimed in your testimony, given on direct, prevent you from operating?

A. That wasn't the *sole reason.*

Q. But you had $500,000.

A. Yes, but when you add interest to what I was already losing, therefore I just didn't think I should operate. *The primary reason was a disabled plant.* This was incidental. I used the letter to try to force some money out of these people." (Tr. 1034-35, emphasis added.)

III. THE APPRAISAL TEAM'S PERIOD OF LOSS INVESTIGATION WAS LESS THAN THE PERIOD OF DISABILITY, THUS DENYING THE INSURED ITS FULL RECOVERY.

The nature of appraisal and adjustment of a business interruption loss demands a judicial pronouncement that **the period of loss investigation must equal the period of time that is reasonable for the insured to rebuild, repair or replace the damaged property.**

The District Court stated that (App. 71):

> "If in making the award the umpire and appraisers adopted a particular theory and then did not apply the theory or rules so adopted by them in arriving at their ultimate conclusion, this would be manifest mistake and the award may be set aside."

If the appraisal team determined a certain period of disability was involved, and failed to use that period consistently throughout their loss computation, then the end result must necessarily be *somewhat different* than their initial reason and judgment. This "somewhat different" test was set forth in *Patriotic Order Sons of America Hall Association v. Hartford Fire Ins. Co.*, 305 Pa. 107, 157 A. 259, 78 A.L.R. 899 (1931), cited with approval by Respondents:

> "It must be shown that, by some error, they were so misled or deceived that they did not apply the rules which they intended to apply to the decision of the case so that upon their own theory, a mistake was made which has caused the result to be *somewhat different* from that which they had reached by their reason and judgment," (Emphasis added.)

The District Court graphically extracts the nub (App. 78, 79):

> "It is this Court's finding that the appraisal award * * * set forth that the rebuilding period of plaintiff's

plant extended from October 3, 1961 to May 2, 1962 and then failed to determine the actual loss sustained by plaintiff during this period. The award therefore is not made in accordance with the terms of the insurance contracts between the parties."

The District Court did not arrive at this last conclusion based solely upon the appraisal award which stated, "The umpire finds the period from October 3, 1961 to May 2, 1962, was a reasonable time in which to rebuild the building and to move and relocate the machinery and equipment * * *"

The District Court showed that the umpire was unequivocal as to the period of disability involved and as to the effect of that disability on production.

The District Court stated (App. 76):

"In his testimony the umpire stated that he recognized that the fire damage was not fully restored until May 2, 1962 (Tr. pp. 201, 202) and that he was aware that the rebuilding effort would interfere with production (Tr. pp. 233-235)."

The umpire was bound by the rules set forth in the policy—to determine **actual loss sustained** for that period of time that the insured's property was disabled.

How is it possible to determine the loss if one totally fails to investigate the effects upon the entire disability period involved? The insured is indemnified under the insurance contract for the loss accruing within a specified period of time, namely the time it takes to rebuild, repair or replace.

The umpire without any ambiguity, in either the written appraisal award, or in his testimony, said the disability was seven months.

Once that disability period is set, the insured must have an absolute, inviolate right to an inquiry for that damaged period.

The period of loss investigation must equal the period of time that is reasonable for the insured to rebuild, repair or replace the damaged property.

Anything less than this is defrauding the insurance consumer who will always be barred from the actual loss sustained unless the period of investigation covers that period of time for which the insured is covered.

This is essential to conform to the policy requirements. The courts have consistently set aside awards which violate this principle.

In *Aetna Insurance Co. v. Murray*, 66 F.2d 289 (10th Cir., 1933), the failure of appraisers to include in the award all of the property covered by the subject agreement rendered the award invalid.

In this case, the appraisal failed to compute the losses for the period of disability as will be shown later.

In *St. Paul Fire & Marine Ins. Co. v. Tire Clearing House*, 58 F.2d 610 (8th Cir., 1932) the court held that the award should be set aside because the appraisers and the umpire failed to follow the terms of the appraisal agreement.

In this case, the appraisal totally ignored the payroll clause in the policy.

In *St. Paul Fire & Marine Ins. Co. v. Eldracher*, 33 F.2d 675 (8th Cir., 1929) the award was set aside because the appraisers had acted beyond and outside the scope of the appraisal in making the award.

The rules for the appraisal are contained in the insurance contract, drafted, priced and sold by the insurance company. At the very least, the insured has the right to rely upon the written word of the insuring agreement and expect the appraisal shall be confined within those insuring rules.

The failure of the appraisal to follow the rules obviously led eventually to ludicrous results:

1. The appraisal allowed expenses to reduce loss for seven months but only investigated the production earnings loss for 3.3 months.

2. The appraisal never determined the effect of the fire on $759,307 worth of goods produced during the disability period from January 9th to May 2nd.

The District Court recognized this horrendous blunder, by stating in its opinion (App. 77):

> "Having found the reasonable rebuilding period extended to May 2, 1962, the umpire had the obligation to determine if the plaintiff achieved a normal profit margin on the actual production of goods made during the period from January 9, 1962 through May 2, 1962. The plaintiff was entitled to a normal profit on its production during that period, and was entitled to a recovery under the insurance policies of its profit margin on actual loss during that period. The umpire in his award gave *no consideration* to these factors * * *" (emphasis added).

The 'no consideration' is evident by the umpire's testimony. It shows that there is no doubt that the intentions of the Appraisal Team were to deny Lakewood any earnings from January 9, 1962 to May 2, 1962 (Tr. 1st 226):

> "Q. What did you allow for potential production from January 9th to April 9th?
>
> A. I never computed it.
>
> Q. You allowed zero for that period, did you not, from January 9th to May 2nd?
>
> A. In the award, yes. That was all taken out. I didn't allow anything for that.
>
> Q. All right. Then can we agree, you allowed no potential production at this plant at all for the period from January 9th to May the 2nd, of 1962?

A. That is one way of interpreting it.

Q. Is it an accurate way?

A. Mathematically you can say that that is correct, sir.

Q. All right. During this same period of time if we deduct from the 278,000 actual in January, the 95,000 potential you did allow for January 2nd to 9th following, for that period from January 9 on the figures you used on actual potential would show a total of $759,250 actually produced. Do you follow the mathematics? This is the 57,278, 144,72, and 359, that totals $854,307 in the actual figures. (Note: $854,307 less $95,000 is $759,250):

A. Yes."

The flagrant abuse of 'no consideration' versus the rights under the policy is shown in graphic contrast by the testimony of the insurance appraiser Butler (Tr. 1st 596-600):

"Q. What was done with die storage after the fire?

A. Some of it was inside the plant and some of it was outside the plant.

Q. Material storage?

A. Some of it was inside and some of it was outside the plant.

Q. And in your judgment as an appraiser *did the storage of material outdoors then produce some inefficiencies?*

A. *There is no question about it.*

Q. And when office space and tool crib space and tool room space is put out into an area that up to then had been serving as an adjunct to production, *this was to introduce new inefficiencies in operating, would it not?*

A. *It would, sir.*

Q. And these inefficiencies would continue until you could properly relocate your office, tool crib and tool room, wouldn't it?

A. To a certain extent, *yes, sir.*"

On direct, Butler testified as follows (Tr. 1st 582):

> "Q. Now, on the basis of all of the information before you what did you find to be the period of interruption of Lakewood's business due to the fire which occurred on October 3, 1961?
>
> A. Well, the period of interruption which we finally agreed upon, which was the length of time which would be required with the exercise of due diligence and dispatch to repair or replace the damaged facility, was from October 3, 1962—correction, 1961, *to May 2nd*, 1962;—" (Emphasis added).

In light of the previous testimony and the signed appraisal award, the District Court had every right to determine that there was no ambiguity as to the period of interruption.

Any attempt to support the appraisal position that no losses existed after January 9th, runs one into a blind alley.

According to the appraisal report petitioner suffered losses on production at an average rate of $50,000 per month during October, November, December and up to January 9th.

Then a miracle happened. Beginning January 10th, petitioner no longer lost a single penny on production through May 2nd, despite the fact that the same work force, the same disabled facilities, and the same type of production, existed on January 9th as on January 10th through to May 2nd.

What magical fairy took away the hurt at midnight on January 9th?

Let us take this one step further. Assuming that the appraisal made a firm finding that no disability existed after January 9th. Even in these circumstances the award, for the sake of justice, would require nullification. The reason is that the testimony overwhelmingly indicated

that disabilities continued to May 2, that certain equipment such as a crane was not re-installed, that the production departments and material were not relocated into their proper locations until early May, 1962.

In view of the testimony, a firm finding that the period of disability ended January 9th would have been fraud, bias or total incompetence.

3. The appraisal allowed zero from January 9 to May 2nd for fixed charges and key employee salaries under the payroll clause in the policy, and which ran concurrently with the period of rebuilding, repairing and replacing. The payroll clause reads, "Due consideration shall be given to the continuation of normal charges and expenses, including payroll expense to the extent necessary to resume operations of the insured with the same quality of service which existed immediately preceding the loss."

Fixed charges are insured and are collectible according to *Business Interruption Primer*, by John D. Phelan, published by Rough Notes Company, Inc., Indianapolis, Indiana, by and for the Insurance Industry, as a salesman's manual to promote the sales of business interruption insurance. Phelan states that Business Interruption insurance is advisable to own, even if a company is operating at a *loss*. On Page 22, Second Edition he says:

> "*Businessman's Question:* 'My client isn't interested in covering anything but his net profit.'
>
> "*Insurance Salesman's Answer:* 'It isn't possible to cover net profit without covering continuing expenses during the interruption. If a policy were drafted to cover new profits only, the insured would have to pay continuing expenses out of this insurance recovery and would probably wind up in the red in the process. Gross Earnings insurance, properly written, guarantees the recovery of new profits by paying

the *continuing expenses* of the business as well as the profits.' "

The conclusion is simple—there was no ambiguity—there was mistake, whether simple or manifest, that denied petitioner its contractual rights. The appraisal was properly set aside for the sake of preserving justice by the District Court.

IV. DECISIONS OF THIS COURT CONCERNING REVERSAL OF A TRIAL COURT'S DECISION BETWEEN TWO PERMISSIBLE VIEWS OF THE WEIGHT OF THE EVIDENCE ARE APPLICABLE TO THIS CASE.

The umpire found that Petitioner's period of business interruption extended to May 2, 1962, but then disallowed losses after January 9, 1962, the beginning date of the Brunswick strike.

The Court of Appeals decision upheld the umpire's conclusion. Respondents assert that *Aetna Casualty & Surety Co. v. American Surety Co.*, 64 F.2d 577 (4th Cir., 1933), and Rule 52(a), Fed. R. Civ. P., support the Court of Appeals (Brief of Respondents in Opposition, pp. 16-18).

If we assume for the purpose of argument that the award is ambiguous, the *Aetna Casualty* case applies, holding that any ambiguity in the award is to be resolved in the light of the testimony of the umpire and appraiser who signed it. The Court of Appeals improperly and in conflict with decisions of this Court failed to recognize that the District Court did consider the award "in light of the testimony of the umpire and appraiser who signed it."

The Court of Appeals reversed *on the facts*, stating that Umpire Yoder intended to terminate petitioner's period of interruption as of January 9, 1962.

The bit of testimony selected by the Court of Appeals (App. 23) in its application of the *Aetna Casualty* rule is overwhelmed by the testimony considered by the District Court. Umpire Yoder testified that petitioner's fire damage was not fully restored until May 2, 1962 (Tr. 1st 201, 202), that he was aware that rebuilding during January, February and March, 1962, would interfere with production (Tr. 1st 233) that he knew that petitioner's production, tools and materials had to be stored outside causing handling inefficiencies (Tr. 1st 192), that the presence of contractors' crews would add to the interruption (Tr. 1st 234), and that the Brunswick strike actually ended nearly one month (April 8, 1962) prior to the end of the interruption period Yoder had selected (Tr. 1st 235). Yoder further testified that he knew that petitioner's supervisory personnel worked overtime to attempt to overcome effects of the fire through March, 1962 (Tr. 1st 194) and that the earliest date petitioner's people could begin to move into the reconstructed building was March 27, 1962 (Tr. 1st 201-202.)

In direct co-ordination with all of this considerable evidence Yoder testified as follows (Tr. 1st. 202):

> "Q. All right; but so far as interruption of business facilities was concerned, did you make a finding that the period up to May 2nd was a reasonable time in which to rebuild the building and move in?
>
> A. That is right."

Comparing this to Yoder's weak, indecisive testimony selected by the Court of Appeals (App. 23) to support its reversal ("I think I do, if not directly, then indirectly"), the Court of Appeals' invasion of the trial court's function becomes very clear. As pointed out in the Petition, the Court of Appeals' notion of its review powers is in direct conflict with numerous federal authorities.

Nor can Rule 52(A) Fed. R. Civ. P. salvage the Court of Appeals' improper conclusion. Rule 52(a) permits reversal only when the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed (*United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), cited with approval by respondents), but not where the trial court has decided between "two permissible views of the weight of the evidence." *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949) at p. 342.

In *United States v. National Ass'n. of Real Estate Bds.*, 339 U.S. 485 (1950) the opinion states at 339 U.S. pp. 495-96:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. (Citations) We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'"

Consideration of the *entire record* of the instant case precludes a determination that the District Court's findings were clearly erroneous. In addition to portions of Umpire Yoder's testimony referred to above, additional evidence discloses that petitioner's business interruption continued beyond January 9, 1962. Brunswick's orders with petitioner were placed considerably in advance of anticipated production and delivery dates. On January 9, 1962, petitioner had on hand about $1,200,000 in Brunswick orders with release dates for purchase of raw materials, production and shipping. From other customers petitioner had approximately $156,800 in orders and received an additional $650,000 prior to May 2, 1962.

Petitioner *actually* produced $759,000 from January

9, 1962, through May 2, 1962, a time during which petitioner's production facilities still were disrupted by reason of the fire. Umpire Yoder knew all of these factors which show that although the Brunswick strike occurred during the interruption period which he determined, the effect of the strike was not to completely curtail petitioner's business on January 9, 1962.

The evidence is overwhelming that the impeding effect of the fire continued after January 9, 1962, and that the umpire and respondents' appraiser knew it but simply failed to compute it. The only evidence contra is the undisputed existence of the strike and the 15 lines of Yoder's testimony singled out by the Court of Appeals.

The District Court's finding that the award must be construed as finding an interruption period extending to May 2, 1962, and that the umpire had the obligation to determine petitioner's loss of profits between January 9, 1962 and May 2, 1962, is based upon the entire record. At the very least the finding is one of "two permissible views of the weight of the evidence."

As such, the Court of Appeals did not have the right to resolve any believed ambiguities differently than the District Court.

V. THE DECISION IN THIS CASE HAS A DIRECT BEARING ON PRESENTLY OUTSTANDING CASUALTY INSURANCE POLICIES TOTALLING APPROXIMATELY THIRTY-SIX TRILLION DOLLARS.

Application of arbitration law to all forms of fire and casualty insurance using an Appraisal Clause directly affects the potential adjustment and settlement of insured losses totalling an estimated **thirty-six trillion dollars.***

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* Computed from *Insurance Facts 1970*, Insurance Information Institute (1970), and 1969 Annual Report, F M B Companies.

Despite Respondents' assertions to the contrary, each and every case relied upon by the Court of Appeals (App. 21) deals with arbitration and not appraisal.

Baltimore & Ohio R.R. v. Stankard, 56 Ohio St. 224 (1897), dealt with arbitration proceedings with all claims to be "final and conclusive" (see Syllabus and Opinion at 56 Ohio St., p. 230).

Pfleger v. Renner, 13 Ohio App. 96 (1920), was an arbitration providing the award of the arbitrator shall be *final and conclusive*.

"The whole matter was to be submitted to the * * * arbitrator, and the parties agreed to abide by and perform and fulfill the award * * *" (13 Ohio App., p. 99) "Where parties make an agreement to arbitrate and provide that the award of the arbitrator shall be final and conclusive * * *" (13 Ohio App., p. 103).

Bates v. Pennsylvania R.R., 26 Ohio L. Abs. 114 (Ct. App., 1937) involved a railroad disability claim similar to the *Stankard* case. The defendant, a member of the railroad's Voluntary Relief Department, agreed to be bound by the Department's rules which stated that controversies "shall be submitted to the determination of the Superintendent, whose *decision shall be final and conclusive thereof*, subject to appeal to the Advisory Committee * * *" (emphasis added). The rules further provided that if there was an appeal, "* * * the decision arrived at thereon by the Advisory Committee *shall be final and conclusive upon all parties without exception or appeal.*" (emphasis added) 26 Ohio L. Abs., p. 116.

In the appraisal clause there is no agreement, express or implied, that the award shall bind the parties. It is apparent the insurance companies prefer an open-end appraisal clause in the fire policy. Otherwise, they would

have inserted the necessary binding language. This is graphically illustrated by the clauses contained in the uninsured motorist policies which typically contain the following language:

> "Such person and (the company) each agree to consider itself bound and to be bound by any award made by the arbitration pursuant to this Section."

The failure of the insurance companies to use "binding" language in the fire appraisal clause makes it obvious that they did not intend an arbitration, which would be subject to the statutory law of the State of Ohio, but rather desired the more liberal standard for appraisals.

This is further evidenced by the fact that the fire appraisal clause only pertains to a monetary evaluation rather than the complete determination of all issues contemplated and covered by arbitration machinery.

The appraisal scheme only deals with value of the items and does not contemplate the finalization of many other issues such as liability, peril insured against and myriad others.

Thus, in the final analysis the overriding question remains. Was the appraisal award: 1. The result of fraud; 2. Made without authority; 3. The result of mistake; 4. The result of manifest mistake; 5. The result of misfeasance?

If any *one* of the above was present in the award it was properly set aside by the District Court.

When the District Court found that the higher degree of manifest mistake was contained in the award, by reason of the appraisal duo failing to follow the evaluation standard after the appraisers established a standard it also automatically found that the lesser included charge of mistake was present.

The confusion in the Court of Appeals' decision arises from its sole involvement with manifest mistake and arbitration cases.

While petitioner agrees that manifest mistake is a ground for nullification, it must emphasize that it is only one of the nullification grounds. Other reasons are fraud, which is not claimed, but also misfeasance, malfeasance, made without authority, and plain, simple, ordinary, old-fashioned **mistake.**

The general rule which states every reasonable (not unreasonable) presumption will be used to sustain in the absence of fraud, misfeasance or mistake, is deliberately broad enough to permit the courts a leeway to prevent injustice. The general rule certainly does not bind a court to a concept that the court must ignore reasonableness and logic and be forced to approve and continue the injustice merely because the mistake is not so manifest that the appraiser is forced to admit he was wrong and correct it when called to his attention.

The rule must be judicially sound and if the error of the appraiser is prejudicial to the interests of a party then that mistake must be corrected despite all protestations of an ego-injured appraiser.

There are an unlimited number of cases previously cited which show that the courts have fulfilled their purpose by correcting errors where they have occurred in appraisals on the sole basis of mistake without conferring or requesting approval of the appraiser before making such a decision for justice.

The Court of Appeals has further added injustice by limiting its view to arbitration cases and then applying them to this appraisal.

The distinction and need for distinction between ap-

praisal and arbitration becomes clear with even surface analysis.

An arbitration clause is inserted in broad, far-reaching agreements which cannot contemplate the type and variety of all potential claims. Therefore there are no specific rules as to formula or how specific computations shall be made, or definitions as to various areas of investigations or the limit of that investigation. Because of the openness of arbitration, statutory rules have been passed governing the results of the arbitration.

The appraisal clause, on the other hand, is not subject to statutory regulations because the appraisal has its own specialized rules in the agreement in which it is contained. The appraisal is bound by agreement which specifically details the area of claim, the time element permitted (period of interruption), the computation requirement as to items like gross earnings, etc.

Thus, it is obvious why a difference must be maintained between the two areas of evaluation.

An insurer purchases a prepared insurance contract which for practical purposes is labeled, "Protection against a specific loss under specific conditions and regulations." When a loss occurs he relies and has a right to rely upon the specific insurance language that he will receive the **"actual loss sustained"** as determined by the insurance contract provisions, not some lesser substituted conglomeration created by a mistaken appraisal.

If the appraisal fails to conform to the policy conditions then the insurance consumer is being defrauded as surely as a food consumer who buys a can labeled crab meat but upon opening finds a can of worms.

The importance of this becomes evident when it is considered that Americans are today holding fire and

casualty policies covering them for **thirty-six trillion dollars.**

If the Courts fail to safeguard their insurance rights the insurance protection on which they rely will be nothing more than ashes in their mouths.

VI. FOR ALL PRACTICAL PURPOSES, THE PERIOD OF DISABILITY AND THE PERIOD OF BUSINESS INTERRUPTION LOSS MUST BE EQUAL TO PROVIDE THE CONTRACT COVERAGE PROVIDED UNDER BUSINESS INTERRUPTION POLICIES.

The Court of Appeals (App. 22, fn. 1) placed great reliance on the theory that a business interruption loss can be shorter, equal to, or longer than the period of disability (the reasonable period required with due diligence to rebuild, repair or replace the damaged property).

The District Court, while acknowledging this *abstract* argument, rejected it in toto since it has little or no practical application generally and had no remote application to this case.

The difference between two Federal Courts should be resolved by a Supreme Court decision since the theory strikes at the very heart of all business interruption policies, which in 1969 provided 80 billion dollars of coverage to American businessmen.

If such an abstract theory becomes cloaked with the respectability of judicial agreement, it will soon transform into a standard weapon to be used to fight the legitimate claims of a pragmatic business world.

Fortunately, to date, the theory is still relegated to the philosopher's shelf and has not been given approval by any tribunal.

Respondents attempt to advance the concept by citing two cases, neither of which offer a scintilla of support.

Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co., 360 F.2d 531 (8th Cir., 1966), states that 33 days was a reasonable time to rebuild the disabled facilities and then proceeded to determine that the insured suffered a loss of $32,000 under the business interruption policy during that 33 day period of interruption. The court merely found that the loss was confined to expenses to reduce loss rather than a loss of production during the period. But the expenses to reduce loss were accrued during the full 33 day of suspension. Thus, the loss period was concurrent with the period of disability.

Rogers v. American Insurance Co., 338 F.2d 240 (8th Cir., 1964), does not confirm that a loss period can be shorter than the disability period. It states that the loss period cannot be *longer* than the disability period. This is in line with the insurance policy which does not permit recovery of losses, even though sustained by an insured, beyond the reasonable time to rebuild, repair or replace.

The abstract theory advanced has been repeatedly rejected by the courts.

In *Hawkinson Tire Tread Co. v. Indiana Lumbermen's Mutual Ins. Co.*, 362 Mo. 823, 245 S.W.2d 24 (1951), the court approved a computation of loss on projected operations at the site of the destroyed premises for the period of time it would have taken to rebuild rather than the shorter period within which the insured actually resumed normal operations at a new location.

In computing the loss, the length of the actual business interruption period caused by the peril insured against can never be shorter or longer than the period of disability. The insurance policy sets this limitation by stating the insurance company will indemnify the insured for **actual loss sustained** for that period of time it takes

with reasonable diligence to rebuild the damaged business property but will not be responsible for losses occurring beyond the period of disability.

Respondents attempt confusion by stating that the "* * * period of actual loss sustained due to business interruption was shorter than the length of time required to rebuild * * *" (Brief of Respondents in Opposition, p. 14).

This is a water and oil mixture.

First, there is no such thing as a "period of actual loss sustained." There is only an actual loss occurring during a period of disability.

There may be reasons arising during the period of disability which will tend to reduce the actual loss sustained but there can never be intervening factors which would cut-off the reasonable rebuilding period or eliminate the need for investigating the extent of the loss during that period of liability.

For example, if during the disability period of interruption there is a strike, then a determination is required to compute the effect of that strike, if any, on the total loss, and if such strike tended to increase the loss, then that amount must be deducted from the total loss, thus leaving an actual loss sustained resulting directly from the fire disabilities.

The appraisal failed to make this distinction, however, and overused the strike to the point that it nullified all effects of the fire on the production and earnings of petitioner.

This created an artificial base which could not be explained away. This is graphically illustrated when respondents' counsel posed a very telling question to the umpire:

"Was the reason why you did not allow for potential production after that date (January 9) because there was no interruption due to the fire after that date?" (Tr. 1st 273).

The umpire flushed, and respondents' counsel then realized the impossible burden he had created by the question and withdrew it.

The record unfortunately only indicates the umpire's answer was "No response."

The District Court comprehended fully the impossibility of reconciling the appraisal with the testimony (App. 75-76):

"The award does not state that after January 9, 1962 the plaintiff's production facilities were no longer disrupted by reason of the fire and no further loss would be sustained. The award does not state that after January 9, 1962 the plaintiff was able to operate efficiently and at a normal profit as the effects of the fire on the plaintiff's operations had terminated. The award does not state that the Brunswick strike ended the period of interruption but rather states that it must be taken into consideration in determining plaintiff's loss."

The District Court went on to say that at a minimum petitioner was entitled to a *normal profit* on its *actual* production during the period from January 9th to May 2nd, "and was entitled to a recovery under the insurance policies if its profit margin on actual production was diminished as a consequence of the fire * * * The umpire * * * gave no consideration to these factors * * *". (App. 77).

Testimony fully supports the District Court opinion. The umpire testified that fire damage existed until May 2nd. (Tr. 1st 201, 202) and that he was aware the rebuilding effort would interfere with production (Tr. 1st

233-235). Despite this the umpire never computed and allowed zero for the period from January 9th to May 2nd (Tr. 1st 226).

The credibility of the insurance appraiser is also subject to question. At one time he testified that any impediment to production was insignificant and not measurable but yet his own creation, defendant's "Exhibit YY." shows that petitioner lost $27,814 below break-even during January on production of almost $278,000 (Tr. 1st 633). Petitioner's normal profits in January should have been 10% (using the umpire's formula) of $278,000. These denied profits of $27,800 plus $27,814 losses resulted in a total loss to petitioner of $55,614 in normal earnings during January.

Petitioner had the option to operate fully, partially, or shut down completely.

The only restriction the policies placed on petitioner's operation was that by whatever method petitioner operated, its losses could not exceed those losses it would have sustained under total suspension. Withers, *Business Interruption Coverage and Adjustment* (1957), at p. 22. Petitioner fully complied with this restriction, suffering losses considerably less by partial operation than a loss of $868,000 it would have suffered under total suspension (Defendants' "Exhibit B").

Corroboration of this theory and reasons for petitioner to curtail its production to reduce its losses are found in the testimony of umpire Yoder and appraiser Butler (Tr. 1st 609-613; Tr. 1st 218).

It is obvious that the insurance appraiser did not appraise the loss but rather negotiated it for the insurance companies. This is evident in the fact he developed three appraisals during his employment by the insurance com-

panies, the first being for $66,658, the second for $156,412 and the third for $183,173.

Even respondents' attorneys concluded that the period of disability extended beyond January 9th. In the opening statement, John Gorman, respondents' counsel, stated that it was their computation that the disability period extended to February 14, 1962 (Tr. 25), nearly five weeks longer than the contrived appraisal cut-off date of January 9th.

The appraisal started out ill-conceived and ended in a disaster that is not capable of being mathematically or logically reconciled.

It appears that this appraisal was in mind when Vol. 4, *Couch On Insurance* 2d was written:

> "An award * * * may be attacked for any reason which would void a contract * * *
>
> "* * * an award based upon an unwarranted conclusion as to a material fact is invalid." Id., Sec. 50:246.
>
> "* * * an award may always be impeached for a mistake clearly appearing on its face." Id. Sec. 50:249.
>
> "An award which is erroneous because it is a mathematical impossibility will be set aside." Id. Sec. 50:251.
>
> "An award which is inconsistent and contradictory on its face if void." Id. Sec. 50:253.

CONCLUSION.

The Court of Appeals used impeached testimony of the appraisers and Mr. Laderman, and ignored unrefuted, reliable testimony of others which resulted in an improper decision based on the following erroneous conclusions:

(1) The Court concluded: "Moreover, Butler testified that interviews with employees of Lakewood revealed that production operations were practically normal by December '61."

Answer to Conclusion 1: There was no such testimony and no such interviews. On the contrary, testimony of Butler and Yoder themselves and Laderman and employees of Lakewood was to the effect that conditions were not normal at Lakewood until after May 2, 1962.

(2) The Court concluded: "* * * the sales value of production dropped significantly during the *three* months of the Brunswick strike * * *." (January, February and March.)

Answer to Conclusion 2: This is not a true statement. Unrefuted testimony showed that production in January, 1962 was *higher* by $36,000, than production in December 1961. The only significant drop in production was during February (to $144,000) and in March (to $72,000). These were the moving months when petitioner curtailed production to *prepare* to move and to *move* all of its dislocated departments to their permanent locations.

(3) The Court concluded: "* * * the fire did not impede production after January 9th * * *."

Answer to Conclusion 3: This is a statement shown to be untrue by testimony of Butler, Yoder and key employees of Lakewood.

(4) The Court concluded: "* * * any impediment to production after January 9th would have been insignificant and not measurable * * *."

Answer to Conclusion 4: Butler testified that petitioner was in the red $27,814 plus a $27,000 loss

of normal earnings, a total loss of $54,800 during January. These figures were obtained from respondent's accountant Baker. (Exhibit YY.) This certainly showed impediment to efficient production and that it was *measurable.*

(5) The Court concluded: "The umpire and appraiser based their determination largely on the fact that in the three months immediately after the fire Lakewood produced at a rate well in excess of $300,000 sales value whereas sales value of production dropped significantly during the three months of the Brunswick strike * * *."

Answer to Conclusion 5: The Court of Appeals accepted the appraisers' determination of the loss, based on what petitioner *actually* produced during January, February and March of 1962, as a measure for determining petitioner's loss. The heart of a business interruption policy is protection from loss of earnings, based on what a prudent businessman *would* probably do, *had no disability occurred.* To use the *actual* experience of an insured, after a disability occurs to measure the loss had no disability occurred, negates completely the purpose of a business interruption policy.

(6) The Court concluded: The appraisal team and the Court of Appeals used a rate of 10% of earnings on sales value of production in their award but allowed Lakewood *zero* earnings on $350,000 sales value of production in April, 1962.

Answer to Conclusion 6: Disabilities were still in existence, per the Butler-Yoder award and testimony, during April, 1962 and petitioner should have been allowed 10% earnings on $350,000 but was allowed *nothing.*

(7) The Court concluded: "(We) must also recognize and find that the strike at Brunswick was the principal cause of the decrease of the sales value of production of Lakewood from January 9, 1962 * * * *"

Answer to Conclusion 7: The appraisal team and the Court of Appeals used the theory that the strike was the principal reason for disallowing petitioner's earnings after January 9th. When the strike ended the theory could no longer be used for denying earnings to petitioner for the 25 days of the disability period during which there was no Brunswick strike (April 6, 1962 to May 2, 1962).

Other mistakes and errors have been pointed out which will become apparent to the Court. The District Court took into consideration at the first and second trial all these matters and made an award based on the facts as disclosed by the testimony. The Court of Appeals misinterpreted and misapplied the evidence and covered all mistakes and errors under an excuse that they could all be explained away as a judgment decision of the appraisal team which had to stand no matter how wrong and how unjust.

The issues involved in this case have tremendous impact on millions of American policyholders and hundreds of insurance companies.

A national clarification will establish a proper and understandable relationship between the insurers and insureds for their mutual benefit. With firm guidelines issued by the Supreme Court, it is hoped that litigation in this field of insurance will be substantially reduced.

Further, in the event of litigation, a national standard of evaluation issued by the highest court, will aid

inferior courts in developing consistent decisions which will tend to reduce the number of appeals, and more important, enhance the image of equal justice for all.

Respectfully submitted,

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Certificate of Counsel.

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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